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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 512

LAWRENCE ROBERTS et al.,
Petitioners,

v.

RALPH STELL et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lawrence Roberts, et al., petitioners here, were Intervenor-Appellees in the case of Ralph Stell, et al. Appellants versus Savannah-Chatham County Board of Education, et al., and Lawrence Roberts, et al., Appellees, lately pending in the United States Court of Appeals for the Fifth Circuit as number 20557. Judgment was rendered therein June 18, 1964. Petitioners moved timely for a rehearing which was denied July 23, 1964.

Petitioners respectfully pray a reversal of the ruling of the United States Court of Appeals for the Fifth Circuit which holds:

(1) That petitioners were bound by the findings and decision of facts by this Court in **Brown v. Board of Education**, 347 U. S. 483, and that that decision "as to its facts" controls all future cases, including this case, even though the "facts" in this case were found by the trial court to be different from those found in **Brown** requiring different findings and a different judgment.

(2) That where the Supreme Court does not **interpret** but merely **applies** a constitutional provision to findings of facts, authorized by evidence in a record before it, an inferior court may not thereafter in a case between other parties make findings of fact, required by evidence before it on like issues, contrary to the findings of fact by the Supreme Court;

(3) That a state is forbidden by the equal protection clause of the Fourteenth Amendment from reasonably classifying its children in its public schools on the basis of their educational aptitudes because the difference in aptitude is also a racial characteristic with the result that the schools continue separate as to race;

(4) That the Supreme Court of the United States held in the "first Brown case" (347 U. S. 483) that segregation in the public schools of a state was proscribed because such segregation in and of itself violated the equal protection clause of the Fourteenth Amendment without regard to facts;

(5) That the Supreme Court intended to hold in the "first Brown case" that "Separate educational facilities are inherently unequal" in all cases; and

(6) That holds that a party to a school segregation suit may not introduce and rely on evidence to show that testimony which was the basis of the conclusion of the Supreme Court in the first Brown case was untrue and, therefore, not a proper basis for a subsequent judgment and decree in a case between other parties.

OPINIONS BELOW.

The United States District Court for the Southern District of Georgia, at the conclusion of a trial on the merits, after hearing evidence on May 13, 1963 denied plaintiffs' motion for a preliminary injunction requiring a prompt start to the de-segregation of the Savannah-Chatham County Schools. The Order recited that a formal order, judgment and opinion would be entered later.

An immediate appeal was entered to the United States Circuit Court of Appeals, Fifth Circuit from the order denying the motion for preliminary injunction. The Opinion of the Court of Appeals requiring the grant of the motion for preliminary injunction pending "the appeal on the merits" is reported in 318 Fed. 2nd 425.

The opinion and final order of the District Court deciding the case on its merits and dismissing the petition was entered on June 28, 1963, by Honorable Frank M. Scarlett, Judge, and is reported as **Ralph Stell, etc., et al. Plaintiffs v. Savannah-Chatham County Board of Education, et al., Defendants,** and **Lawrence Roberts and Daniel Roberts, minors by Adrienne Roberts, their mother and next friend, et al., Intervenors,** 220 F. Supp. 667.

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the District Court, rendered on June 18, 1964 is reported in 333 F. 2d 55.

The order of the Court of Appeals denying applicants' motion for rehearing is dated July 23, 1964 (333 F. 2d 55).

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was dated and entered June 18, 1964.

The order of the Court of Appeals denying petitioners' motion for rehearing was dated and entered July 23, 1964, whereupon mandate was issued and transmitted.

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), United States Code, and under Title 28, Section 2101 (c).

QUESTIONS PRESENTED.

(1) Was the decision of the Supreme Court in **Brown v. Board of Education**, 347 U. S. 483, based in whole or in part on **Findings of Facts**?

(2) Are persons not parties to an action *in personam* nor in privity with them bound by a decree grounded in whole or in part on findings of facts in such case where the facts applicable to such persons in another case authorize or require different findings?

(3) Where persons not parties to an action *in personam*, and not in privity with parties but are strangers who have never had their "day in court" are nevertheless held to be bound by the judgment and decree in such case, are such persons deprived of their liberty or property without due process of law, within the meaning of the due process clause of the Fifth Amendment?

(4) Where the Supreme Court of the United States declined to **interpret** a provision of the Fourteenth Amendment because the evidence as to its meaning was "inconclusive", but nevertheless **applied** such provision as previously interpreted to certain findings of facts by trial judges, disclosed in case records before it, supplemented by non-legal materials called to its attention in a "Brandeis Brief" and its own conclusions from such records, are the Court's findings and conclusions and the decision based thereon, the law of the land binding on all persons in all cases involving like questions of fact but unlike evidence as to such facts?

(5) Where the Supreme Court applies a constitutional provision to findings of facts, authorized by evidence

before it, may an inferior court thereafter in a case between other parties make findings of fact demanded by evidence before it on like issues directly contrary to the findings by the Supreme Court on other evidence and base its judgment thereon?

(6) Is a State absolutely forbidden by the Equal Protection Clause of the Fourteenth Amendment from classifying its children in its schools on the basis of racial characteristics having educational significance?

(7) Is a State forbidden by the equal protection clause of the Fourteenth Amendment from reasonably classifying its children in its public schools on the basis of their educational aptitudes because the difference in aptitude is also a racial characteristic even though the result may be that the schools continue separate as to race?

(8) May not a proper party to a school segregation case introduce testimony of like character, but of opposite tenor to that upon which the judgments of the lower courts reviewed in the Brown case were based?

(9) May not a proper party to a school segregation case introduce evidence to show that the testimony which was the basis of the conclusion of the court in the first **Brown** case, claimed to be binding on him, was false, and known at the time of its being offered to be false?

LAW INVOLVED.

That portion of the Fifth Amendment to the Constitution of the United States which is:

> ". . . No person shall be . . . deprived of life, liberty or property, without due process of law."

That portion of the Fourteenth Amendment to the Constitution of the United States which is:

> ". . . no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

This case originated as a class action in the right of Ralph Stell and other minor negro plaintiffs similarly situated as students in public schools of Savannah-Chatham County to enjoin defendant Board of Education from operating a bi-racial school system. It was alleged in the complaint that admission to the schools involved was determined **solely** upon the basis of race and color resulting in injury to them. The existence of a dual school system for whites and negro students were conceded by the defendants.

A motion to intervene on behalf of themselves and their class was made by Lawrence Roberts and other minor white school children similarly situated in Savannah alleging that the separation of white and negro children in the public schools caused no injury to negroes but on the contrary avoided injury to both white and negro school children and that such separation was not determined solely by race or color but rather upon racial traits or characteristics of educational significance as to which racial identity was only a convenient index.

Among the significant facts alleged to be relevant in devising a rational program best suited to the peculiar educational needs of white and negro school children in separate schools were:

(a) Differences in specific capabilities, learning progress rates, mental maturity, and capacity for education in general;

(b) Differences in physical, psychical and behavioral traits. The differences were alleged to be of such magnitude as to make it impossible for negro and white children of the same chronological age to be effectively educated in the same class rooms.

It was alleged that to congregate children of such diverse traits in schools in the proportions and under the conditions existing in Savannah would seriously impair the educational opportunities of both white and negro children and cause them grave psychological harm.

The intervention was allowed. Evidence fully supporting the allegations of the intervention was introduced by the intervenors.

In addition, Mrs. Motley, counsel for plaintiffs stipulated in open court that "tests . . . show that negroes generally do not perform on achievement tests as well as whites" (Tr. p. 134).

In spite of the stipulation by Mrs. Motley, intervenors showed that substantial mental differences do exist and that white children and Negro children with such mental differences cannot be educated successfully in the same schools and that any attempt to so educate them, where the numbers are such as existed in Savannah (60 per cent white and 40 per cent Negro) would deprive both Negro and white school children of their educational opportunities and would cause irreparable injury to children of both races.

Evidence was adduced also to show physical and morphological differences between whites and Negroes justifying if not demanding segregation of races. It was shown that the size of the brain of the average Negro is approximately 8 per cent to 10 per cent smaller than the brain of the average white person of similar age and weight and that in general the larger the brain with relation to body weight the greater the intelligence—a relationship that holds true throughout the animal kingdom. That evidence, which accords with numerous scientific studies on that subject, forcefully established that the gross differences in the educability of Negroes and whites is inherent or

genetic—not environmental—and cannot be materially affected by improved environment.

There was no evidence to the contrary, counsel for the plaintiffs contending that such evidence was, under the Brown case, irrelevant and not to be considered by the trial court. Counsel for plaintiffs in objecting to the evidence stated:

". . . the law is settled by the Supreme Court in the Brown case that segregation itself injures Negro children in the school system. That is what the Supreme Court's decision is all about, so we do not have to prove that."

The trial judge thoroughly analyzed the Brown decision, and on the basis of his analysis (220 F. Supp. 676-8), and **his determination** that the **Supreme Court's determination** in the Brown case was a finding of fact, and a conclusion based on the findings of fact there before the Court, he held "that the existence or non-existence of injury to white or black children from integrated or segregated schooling is a matter of fact for judicial inquiry and was so treated in Brown."

So holding, the trial judge said: "The factual nature of the finding of injury through segregation in Brown opened the door to the proof which intervenors have made in this case and plaintiffs' objection was overruled."

The court accepted the proffered evidence in this case "as having somewhat stronger indicia of truth than that of which the findings of potential injury were made in Brown".

Having accepted intervenors' proof, it nevertheless became necessary for the Court to "answer the question whether racial traits of compelling educational significance constitute a reasonable basis for classification under the police power of the State within the limitations of the Fourteenth Amendment to the Constitution.

In reaching its answer, the Court considered cases which had stated and applied the "well known classification rules under the Fourteenth Amendment," and held "that classification based on racial traits directly concerned with proficiency and mental health is a reasonable one within the intendment of the equal protection provision of the Constitution."

At the conclusion of the evidence and before the formal judgment and an opinion were filed, the Court overruled the motion of plaintiffs for a preliminary injunction on May 13, 1963.

Having so held, the complaint was dismissed and judgment entered against the plaintiffs on June 28, 1963.

There was an application by plaintiffs to the Court of Appeals for interim relief immediately after the order of May 13, 1963. In granting that application, the Court of Appeals treated the "sole purpose" of the intervention to be "to adduce proof as a factual basis for an effort to ask the Supreme Court to reverse its decision in **Brown v. Topeka Board of Education**" (318 F. 2d 425, 427). Said treatment was based on an erroneous supposition without basis in the record.

In reversing the trial court on the plenary appeal the Court of Appeals said: "We do not read the major premise of the decision of the Supreme Court in the first Brown case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal. This being our interpretation of the teaching of that decision, it follows that it would be entirely inappropriate for it to be rejected or obviated by this Court" (333 F. 2d 55, 61). This statement was repeated in the ruling on appeal on June 18, 1964, which is here brought in question.

REASONS FOR ALLOWANCE OF WRIT.

Brief excerpts from the District Court decision, appealed to the Circuit Court, and the decision of that court, now complained of, lay bare an issue so vital or crucial that it cannot long rest unsolved. In the District Court Judge Scarlett said:

> ". . . this Court is bound by the decision in **Brown v. Board of Education** to the extent that it states rules of law. It has no application to any determination of **facts** in that case." (Emphasis supplied.)

On appeal, the Fifth Circuit Court of Appeals said:

> ". . . No inferior federal court may refrain from acting as required by that decision **(Brown)** even if such a court should conclude that the Supreme Court erred **either as to its facts or as to the law.**" (Emphasis supplied.)

We contend that District Judge Scarlett was right and the Fifth Circuit Court of Appeals was wrong. Upon the answers to that question depends the course of judicial history, independent of transient or contemporary causes. It should be decided—and decided right.

QUESTIONS 1, 6, 7, 8 AND 9 SET FORTH ABOVE, DISCUSSED TOGETHER.

HOW THE FACTS BECAME CONTROLLING IN BROWN AND WHY THE SAME FACTS NOT CONTROLLING HERE.

This is the first case to be tried in a Federal Court since 1954 in which white school children were permitted to appear or have a day in court to take issue with the allegations made in petitions such as were filed in behalf of Negro children in the underlying **Brown** cases and in

later cases. White school children in this case alleged and established by evidence the existence of a rational basis for legislation or administrative policies requiring the separation of school children by race for educational purposes.

In all cases prior to 1954 judicial notice of racial inequality and of the existence of a rational basis for separation of races, within the meaning of the Fourteenth Amendment was relied on, and no evidence of such facts was necessary. **United States v. Bhagat Singh Thind**, 261 U. S. 204, 215 (1923); **Gong Lum v. Rice**, 295 U. S. 78, 86 (1924); **Farrington v. Tokushige**, 11 F. 2d 710 (C. A. 9, 1927); **Wolfe v. Georgia R. & Elec. Co.**, 2 Ga. App. 499, 504 (1917). Hence, the appearance of white children before any of the trial courts in the cases underlying **Brown** would have been anomalous.

The Georgia case is typical. In it Judge Richard B. Russell, then judge of the Court of Appeals of Georgia, subsequently Chief Justice of the Supreme Court of Georgia and father of United States Senator Richard B. Russell, Jr., and the late Robert Russell, formerly Judge of the Fifth Circuit Court of Appeals said: "We cannot shut our eyes to the facts of which courts are bound to take judicial notice. Certainly every court is presumed to know the habits of the people among which it is held, and their characteristics, as well as to know leading historical events and the law of the land . . . It is a matter of common knowledge that, viewed from a social standpoint, the negro race is in mind and morals inferior to the Caucasian.

We are not compelled to plan our decision on the ground of inequality or inferiority. We take judicial notice of an intrinsic difference between the two races. Certainly, if a court can take judicial notice of near a thousand things, some even of slight importance, which have been

judicially recognized without proof, this court may be presumed to observe that there is a marked difference between a Caucasian and an African. Notice of this difference does not imply legal discrimination against either, and for that reason cannot . . . impugn or oppose the 14th and 15th Amendments . . ."

It is necessary and appropriate to resort to proof only when the existence of a rational basis for state action, under constitutional attack, depends on facts beyond the sphere of judicial notice. **United States v. Carolene Prod. Co.**, 304 U. S. 144 (1938). There the Court said:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Id.* at 153.

In the cases underlying **Brown**, the NAACP attorneys attacked state legislation by attempting to show that significant differences of which judicial notice had been taken throughout history either never existed or had ceased to exist.

Mr. Thurgood Marshall explained:

> "There are several ways of going about proving the unconstitutionality of statutes. They haven't shown any line of reasoning for the statutes . . . [W]e have a right to put in evidence to show that segregation statutes . . . have no line of reasonableness. There is no understandable factual basis for classification by race, and under a long line of decisions by the Supreme Court, not on the question of Negroes, but on the 14th Amendment, all courts agree that if

there is no rational basis for the classification, it is flat in the teeth of the 14th Amendment." Record of Evidence, **Briggs v. Elliott**, p. 159.

The records in the underlying **Brown** cases reveal no testimony rebutting that of Dr. Redfield, Clark and others which went to show (1) that Negro and white school children are equal in educability; (2) that Negroes are injured by segregation, and (3) that hence there was no "rational basis" for educating them separately in schools.

Both before and since **Brown** the Supreme Court has consistently adhered to the constitutional principles correctly stated by Mr. Marshall. See **Lindsley v. Natural Carbonic Gas Co.**, 220 U. S. 61 (1911); **Hernandez v. Texas**, 347 U. S. 475, 478 (1954).

In the latter case, decided two weeks before the decision in **Brown**, Chief Justice Warren, for a unanimous bench, pointed out that race and color serve to define distinct groups. Continuing he said:

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment **not based on some reasonable classification**, the guarantees of the Constitution have been violated." (Emphasis added.)

Having found as a matter of fact that there were no differences between colored school children and white school children, such as to constitute a reasonable basis for separate education, it was logical for this court to hold as it did hold, that the state laws in question from Kansas, South Carolina, Delaware and Virginia, requiring segregation of children in public schools were purely arbitrary and hence unconstitutional and should be set aside at the suit of one injured thereby.

Brown did not hold that it is a violation of the equal protection clause to separate Negro children from white children, *per se*. What it did hold was that under the facts in the records before the court showing equal educability and injury to Negroes resulting from segregation it was a violation of the equal protection clause to separate whites and Negroes of the same "educational qualifications" (347 U. S. at 492) and "of similar age and qualifications" (347 U. S. at 494).

The implied finding by the Supreme Court in **Brown** that Negro school children and white school children are equal in educability was based principally on the expert opinion testimony of Dr. Robert Redfield. Briggs, Record, p. 160.

The finding of fact in **Brown** to the effect that segregation of races in schools injured Negro children, and which necessarily presupposed equal educability, was based upon the testimony of Dr. K. B. Clark, **who was the only witness who purported to testify from the results of tests conducted by himself**, and upon the writings of Otto Klineberg.

BROWN RESULTED FROM FINDINGS OF FACTS BASED ON QUESTIONABLE EVIDENCE AND QUESTIONABLE NON-LEGAL WRITINGS—NOT CONTROVERTED.

The testimony of Drs. Redfield and Clark are discussed in the opinion of Judge Scarlett. Dr. K. B. Clark, who was cited in Footnote 11 of **Brown** as the first modern authority relied on by the Supreme Court, testified in **Briggs v. Elliot**, and in at least one of the other cases underlying **Brown**, that segregation of colored children from white children in schools had a detrimental effect upon colored children thereby injuring them. Briggs, Record, p. 89.

However, six years after this Court was induced to act on that testimony Dr. Clark repudiated his testimony saying:

> "[I]t was pointed out to them [the NAACP lawyers] in the cases underlying **Brown** that the available studies had so far not isolated this single variable [meaning the effect of school segregation upon the personality of Negro children] from the total social complexity of racial prejudice, discrimination, and segregation. It was therefore not possible to testify on the psychologically damaging effects of segregated schools alone." K. B. Clark, **The Desegregation Cases: Criticism of the Social Scientist's Role,** 5 Vill. L. Rev. 224, 231 (1960).

In the underlying **Brown** cases Dr. Clark's testimony was based principally, if not exclusively, upon a doll test given to sixteen Negro children in a segregated school in South Carolina. However, in a previous doll test reported in **Readings in Social Psychology,** Clark & Clark, in a chapter entitled **Racial Identification and Preference in Negro Children** (Newcomb & Hartley ed. 1947), involving several hundred white and Negro children both in the integrated North and the segregated South, it had been found and reported by Dr. Clark that integration—not segregation—injures the personality of Negro children. *Id.* at p. 177.

The dubious nature of the factual testimony of Dr. Clark is fully demonstrated in an article by Dr. van den Haag, entitled **Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark,** 6 Vill. L. Rev. 69, 77 (1961), to which the attention of the Court is directed.

As late as June, 1963, Dr. Clark conceded that injury is being done to Negro children in the schools of the North. He said:

"The bulk of the Negro youngsters who are being turned out by these . . . Northern schools are functional illiterates. They have not been taught to read or speak well. They are deficient in arithmetic. They are not equipped to compete, with any hope of success, for other than menial jobs." **U. S. News & World Report**, June 10, 1963, p. 39.

Dr. Otto Klineberg who, together with Clark, was the principal author of the "Social Science Statement" called to the Court's attention in "The Appendix to Appellants' Brief" in **Brown** repudiated the conclusions drawn from his writings in **Brown** four years after the Court was induced to rely on them, saying in part:

"The second point I wanted to make was that I think there has been some misunderstanding about the social science statement. We were very careful in the statement not to say that segregation caused all of these troubles, because we did not have the data that showed that children brought up in segregated schools were very different from those brought up in non-segregated schools; we had to put our conclusion in terms of the overall effect of discrimination. I think that is very important. We need more research on segregation versus non-segregation." **The Role of the Social Sciences in Desegregation: A Symposium**, p. 47 (published by the Anti-Defamation League of B'nai B'rith, August, 1958).

In 1935, Dr. Klineberg published a book authored by him entitled **Race Differences**. On pages 152-153 he reported that a multiplied number of studies in the field of racial psychology disclosed the "inherent intellectual superiority" of whites over Negroes, saying:

"The largest proportion of these investigations have been made in America, and the results have shown that racial and national groups differ markedly from one another. Negroes in general appear to do poorly."

He commented that the mental age of the average Negro draftee in World War I "was calculated to be 10.4 years, as compared with 13.1 years for the White draft."

In 1960, Dr. Henry E. Garrett, formerly the head of the Department of Psychology of Columbia University, in an article entitled "Klineberg's Chapter on Race and Psychology" published in the **Mankind Quarterly**, Vol. 1, No. 1 (July 1960), severely criticized the non-scientific writing of Klineberg on **Race and Psychology.**

Five years after the decision in **Brown**, Jack Greenberg, counsel for the NAACP in **Brown**, now its General Counsel and leading counsel in this case, wrote that from 25 to 45 Negro high school graduates per 1000 from southern segregated schools attained national college admissions standards in 1954 as against less than 2 per 1000 from northern integrated schools. Greenberg, **Race Relations and American Law** 211 (1959).

Dr. Alfred H. Kelley of Wayne State University contributed vital evidence of the pattern of deception practiced on this Court in **Brown**, in a speech in which he described in some detail how he helped to present the **Brown** case to the Supreme Court. In part he said:

> "It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts, and above all interpreting facts in a way to do what [Thurgood] Marshall said we had to do—'get by those boys down there.'" "Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate", 87th Congress, 2nd Session, pp. 166-178.

Dr. Clement E. Vose, Assistant Professor of Political Science, Western Reserve University, was given access to

NAACP files to enable him to prepare an article friendly to NAACP on NAACP strategy in Courts. Strategy in covenant cases was his subject, but the strategy successfully employed there was further refined for use in cases involving school children. This article appears in **Western Reserve Law Review** (Winter Issue 1955), Vol. 6, p. 97.

On page 130 Dr. Vose devotes a chapter to the subject "Flooding the Law Reviews". On page 133, the sub-title is "NAACP's 'Friends of the Court' ". Under that subtitle Dr. Vose discussed the flood of *amicus curiae* briefs, designed to influence judges, prepared by lawyers some of whom were paid by the NAACP. Dr. Vose comes to a conclusion on page 145, which we quote:

> "Scrutiny of the NAACP's part in the successful litigation which ended the court enforcement of racial restrictive covenants indicates techniques used by a pressure group dealing mainly with the judiciary. The NAACP carefully planned its test cases and encouraged publication of articles for use in its legal briefs. The Association showed adeptness in bringing the Court's attention to its political strength in the Executive Branch and in the nation at large by winning the support of the Justice Department and the organizations which filed AMICI CURIAE briefs."

The foregoing fragments form an ugly pattern constituting compelling reasons for the allowance of the writ prayed for here. It serves also to answer affirmatively "Question (9)" above. **Hazel Atlas Glass Co. v. Hartford-Empire Co.**, 322 U. S. 238, 64 S. Ct. 997; **Shawkee Mfg. Co. v. Hartford-Empire**, 322 U. S. 271, 64 S. Ct. 1014; 28 U. S. C. A. 60, in which this Court set aside judgments rendered ten years before for less reprehensible deception and misconduct than that above disclosed.

FINDINGS OF FACTS AFFECTS PARTIES— NOT OTHERS.

It is now and has ever been the rule that insofar as a Court may find facts in a particular case, such finding, like the verdict of a jury, is only binding upon the parties to that particular case and is not binding upon other parties and other courts in other cases. **Brooks v. Marbury**, 24 U. S. 78, 90; Columbia Broadcasting System v. U. S., 311 U. S. 407. The "bearing down", "sliding off", "ignoring" or "interpreting" of facts deceitfully in order "to get by" judges, as Dr. Kelly described it, may not result in the immutable definition of rules that others must live by for eternity.

In the quotation from **Brown** by the Court of Appeals of the Fifth Circuit (333 Fed. 2nd 66), set out above, this Court seemed to confine the "findings" of facts in **Brown** to **Brown**. The quotation says (with interpolations for emphasis):

> "We conclude [from the evidence in these cases] that in the field of public education the doctrine of 'separate but equal' has no place [According to these records]. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs [in these four cases] and others similarly situated [in the South Carolina, Virginia, Delaware and Kansas School Districts here involved] for whom the actions have been brought are, by reason of the segregation complained of [by the plaintiffs in these particular school districts], are deprived of equal protection of the laws guaranteed by the Fourteenth Amendment."

At page 493 of **Brown**, the court said:

> "We come then to the question presented: Does segregation of children in public schools solely on

> the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

Why did the court believe that it does?

Repeatedly, prior to and since May 17, 1954, the court has announced the rule:

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some discrimination. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it" **McGowan v. Maryland**, 366 U. S. 420, 425-6 (1961).

The Court on May 17, 1954, did not hold that there was no state of facts which might reasonably be conceived which would justify the separation of children in school on account of their race. How could the court have done so in the light of the decisions of scores of courts of last resort to the contrary, including those of such states as Massachusetts, New York, California, Indiana and Ohio upholding segregated education?

In **Brown** the court believed that the uncontroverted facts before it did not justify separation. It particularly relied on two findings of fact by two of the lower courts whose judgments were being reviewed, and on what it considered to be the teachings of modern authorities as to psychological knowledge.

One of these findings of fact appears at page 494 in a quotation from the Kansas case under review (98 F. Supp. 797, 798).

Besides the findings of fact, mentioned above, the court at pages 494-5 said:

> "Whatever may have been the extent of psychological knowledge at the time of **Plessy v. Ferguson, this finding** is amply supported by modern authority (Appended in footnote 11). Any language in **Plessy v. Ferguson** contrary to **this finding** is rejected" (Emphasis added).

This finding evidently refers to the finding in the Kansas case, supra, which is thus made directly the basis of the conclusion which immediately follows.

If these findings of fact, and this modern authority, **were not** the basis of the court's conclusion which immediately follows the last quoted excerpt from the opinion, why did the court go to the trouble of quoting them, and alluding to them?

If these findings of fact, and this modern authority, **were** the basis of the court's conclusion, why do applicants not have the same right as did the plaintiffs there to introduce evidence to the contrary, and have it considered as a basis for a conclusion? If the "modern authority" relied on by the court there is not worthy of belief or not proper as a basis of a judicial opinion, why do the applicants not have the right to demonstrate its falsity or incorrectness?

"Finding" implies a hearing or investigation of facts; it is the ascertainment of facts; it means the facts which the court considers established by the evidence. **Words & Phrases**, Perm. Ed., Vol. 17, pp. 18 et seq.

The word is so used repeatedly in the Federal Rules of Civil Procedure. For example, in Rule 52, the Court, in actions tried upon the facts without a jury, is required to find the facts specially, and state separately its conclusions of law thereon.

We suggest that what the Supreme Court on May 17, 1954, did was to find facts exactly as is required of trial

courts trying facts without a jury. It found the facts to be as stated in the Kansas and the Delaware judgments being reviewed, and formed its conclusion of law based thereon.

Such a "finding" of fact appears in footnote 10, page 494, wherein the court said:

> "A similar finding of fact was made in the Delaware case: '**I conclude from the testimony** that in our Delaware society, State imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.' ... De. Ch. ...., 87 A. 2d 862, 865." (Emphasis added.)

Immediately following the language which is quoted in footnote 10 (from the opinion of Chancellor Seitz) is this sentence:

> "**But my factual conclusion** does not dispose of the first question presented (emphasis supplied) . . . Specifically, I must decide whether such a finding of fact as I have made here, is a proper basis for holding that such separate facilities can not be equal . . ."

One reason for the "finding" in the Delaware case was stated by the Chancellor. He said that the plaintiffs "produced many expert witnesses in the fields of education, sociology, psychology, psychiatry and anthropology . . . No witnesses in opposition were produced" (87 Atl. 2d at page 864).

Professor Isidor Chein, whose writings were cited in footnote 11 of **Brown** as "authority" stated a like reason for the "finding" by the Supreme Court in **Brown**. He wrote that the testimony of the NAACP's social science witnesses stood uncontroverted in the records of the **Brown** case. He said:

"In the segregation cases, apparently, no . . . opposing experts could be found with respect to our testimony." **The Role of the Social Sciences in Desegregation: A Symposium**, published by the Anti-Defamation League of B'nai B'rith (1958), p. 9.

To the same end we continue with a quotation (with interpolation), from page 495, which immediately follows that quoted by the Fifth Circuit Court of Appeals in this case:

"Because these are class actions, because of the wise applicability of this decision [relating to school children 'similarly situated' in four separate school districts in four separate states] and because of the great variety of local conditions [in the four separate school districts in four separate states] the formulation of decrees in **these cases** presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that [under the records before us] such segregation is [as a matter of fact] a denial of the equal protection of the laws. In order that we may have the full assistance of the parties [in these four cases] in formulating decrees, the cases will be restored to the docket, and the parties are requesting to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term."

A quotation, from the second **Brown** case, on the same page of the June 18th decision of the Court of Appeals as the preceding, is instructive:

"The courts [which tried the four cases underlying **Brown**] will require that the defendants [in these four cases] make a prompt and reasonable start toward full compliance with our May 17, 1964, ruling.

> Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner."

Another illustration showing that the findings in **Brown** were limited to **Brown** is the following which appears on pages 492 and 493 of the first **Brown** case:

> "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives **these plaintiffs** [in these four cases] of the equal protection of the laws." (Emphasis supplied.)

The decision of May 17, 1954, bristles with evidence that this Court was deciding the cases before it based on findings of facts spread upon the records before it.

FURTHER DISCUSSION OF LIMITS OF BROWN FINDINGS.

In **Plessy v. Ferguson**, 163 U. S. 537, at page 551, Justice Brown wrote for the Court:

> "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

In the September, 1964, issue of **The Atlantic Monthly** is an article entitled, "The March Toward Equality" by Anthony Lewis, a Harvard graduate of 1948, who has been with the Washington Bureau of the New York Times since 1955, covering the Supreme Court and the Justice Department.

In that article, of the language from **Plessy v. Ferguson** just quoted, Mr. Lewis says:

> "Justice Brown did not cite any legal authorities for that proposition. Nor could he, for it was nothing but a psychological or sociological thesis, doubtless widely accepted in his day, but not universally even then." **The Atlantic Monthly** (Sept., 1964), Vol. 214, p. 60.

In the same article, at page 64, this noted author says that in the opinion of May 17, 1954:

> "Justice Brown has simply been **proved wrong** in his sociological hypothesis, in **Plessy v. Ferguson**, that there was nothing invidious about segregation unless the Negro 'chose to put that construction upon it.'" (Emphasis added.)

By what was the hypothesis in **Plessy v. Ferguson** "proved wrong" in **Brown v. Topeka** and companion cases?

If it was "proved wrong", it was so proven to the satisfaction of the Court by the findings of fact in the Kansas and Delaware cases, the witnesses in the South Carolina and Virginia cases and the modern authorities cited in footnote 11.

If the hypothesis of 1896 in **Plessy v. Ferguson** could legally be proven wrong in 1954, why cannot the findings and conclusions of 1954 likewise be proven wrong in 1964?

In the Brief for the United States as Amicus Curiae, dated December, 1962, in **Brown v. Topeka** and companion cases as they were docketed at the October Term 1952 (Nos. 8, 101, 191, 413, 416), the then Attorney General and his Special Assistant, in discussing **Plessy v. Ferguson**, said:

> "In sum, the doctrine of 'separate but equal' is an unwarranted departure **based upon dubious assump-**

> **tions of fact** combined with a disregard of the basic purposes of the Fourteenth Amendment, from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law. The rule of stare decisis does not give it immunity from reexamination and rejection'" (pp. 26-7) (Emphasis added).

That is exactly what we urge as to **Brown v. Topeka.**

Hitherto in that same brief, the Attorney General of the United States had recognized the findings of fact in the trial of the cases under review.

At page 10 it was written:

> "In the Virginia, South Carolina, and Delaware cases, physical inequality, apart from segregation, was expressly found, and these findings of fact are not here challenged."

At page 12, there is quoted the finding of fact in the Kansas case which was afterwards quoted verbatim in the opinion of the Supreme Court.

In a footnote (8) on the same page appears a reference to the finding in the Delaware case which is the basis of footnote 10 on page 493 of the Supreme Court's subsequent opinion.

Then on pages 13 and 14 appears language part of which we bold face for emphasis:

> "It suffices to note that the **Plessy** case plainly does not preclude a district court from finding, as the district court found in the Kansas case, that segregation can, and in the particular instance does, produce unequal and inferior treatment. In **Plessy** the Court indulged in an abstract speculation as to the effects of racial segregation in general; in No. 8 there is a **contrary finding of fact, based on evidence** and not on unproved assumptions, as to the particular

effects of racial segregation in public schools on the education of colored children. **Hence, we believe, the Kansas District Court erred in construing Plessy v. Ferguson as compelling a holding of constitutional equality where there is a specific finding of fact that the particular type of enforced racial segregation creates inequality.''**

If **Plessy v. Ferguson** could by this argument be distinguished, as it later was in the 1954 decision, why cannot, by the same token, the 1954 decision be now distinguished?

A. In 1954, the "abstract speculation" in **Plessy** was distinguished by the use of a specific finding of fact.

B. In 1963, that specific finding of fact was distinguished by Judge Scarlett because of the undisputed facts before him in the case at bar.

If A is permissible, why not B?

After the decision of May 17, 1954, Mr. Lewis tells us, in his article, supra, that the Solicitor General submitted a brief for the Federal government suggesting that the cases be remanded to the trial courts to work out local problems (op. cit., p. 64).

Paraphrasing what the Attorney General said at page 14 of the brief of December, 1952, we say:

> "Hence, we believe, the United States Court of Appeals of the Fifth Circuit erred in construing **Brown v. Topeka** as compelling a holding of constitutional inequality, where there is a specific finding of fact to the contrary."

A *fortiori*, is that true when, as here, there is a showing that the finding was based on testimony which has been demonstrated to be of questionable value.

We call particular attention to the discussion of this phase of the case in the opinion of the District Judge as it appears at pages 679-80 of Volume 220, Federal Supplement. His discussion concluded with these words:

> "The Supreme Court has on other occasions itself withheld or recalled earlier determinations where evidence had been shown to have arisen more from the necessities of counsel than the compulsion of fact. **Hazel-Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, . . . **Shawkee Mfg. Co. v. Hartford-Empire Co.**, 322 U. S. 271 , . . See also 28 U. S. C. A. rule 60."
>
> "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." **McGowan, et al. v. Maryland** (Per Mr. Chief Justice Warren), 366 U. S. 420, 426.

A footnote (3) quotes from **Williamson v. Lee Optical**, 348 U. S. 483, 489, concluding with these words:

> "The prohibition of the Equal Protection Clause goes no further than the **invidious discrimination**." (Emphasis is that of the Court.)

The rule thus stated applies although the classification may be based on race or national origin if the grounds for the classification are relevant to the achievements of the State's objective.

There are those today who would have us believe that the law is that all classifications based upon race, or national origin, are *per se* invidious.

That has never been the law, and is not now.

Bolling, et al. v. Sharpe, et al., 347 U. S. 497 (May 17, 1954) held:

> "Classifications based solely upon race must be scrutinized with particular care, since they are con-

trary to our traditions and hence constitutionally suspect" (p. 499).

That which is "constitutionally suspect" is not necessarily constitutionally void.

The two cases cited in support of the quoted sentence demonstrate that:

> "It should be noted to begin with that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. **That is not to say that all such restrictions are unconstitutional.** It is to say that courts must subject them to the most rigid scrutiny." **Korematsu v. United States**, 323 U. S. 214, 216.

The orders there were subjected to the most rigid scrutiny. But, a majority of the court held them to be valid. So were the orders under review in **Hirabayashi v. United States**, 320 U. S. 81.

More recently, Justice Harlan speaking for the Court said:

> "We of course recognize that the Fourteenth Amendment reaches not only **arbitrary** class exclusions from jury service based on race or color, but, also, all other exclusions which 'single out' any class of persons 'for different treatment not based on some **reasonable** classification.' **Hernandez v. Texas**, 347 U. S. 475, 478." **Hoyt v. Florida**, 368 U. S. 57, 60.

So, with respect to aliens, the Court in **State of Ohio ex rel. Clarke v. Deckebach**, 274 U. S. 392, unanimously upholding an ordinance forbidding the issuance of a license to aliens to operate a pool and billiard room, said:

> "Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens . . . (citing cases) . . ., it does not fol-

low that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification . . . (citing cases) . . ."

One of the cases cited is **Patsone v. Pennsylvania,** 232 U. S. 138, wherein the Court said:

"A State may classify with reference to the evil to be prevented. The determination of the class from which an evil is mainly to be feared and specialized in the legislation is a practical one dependent upon experience, and this court is slow to declare that the state legislature is wrong in its facts."

That opinion, too, was written by Mr. Justice Holmes. The court upheld the validity of a statute making it unlawful for any unnaturalized foreign born resident to kill wild birds or animals, and to that end making the possession by them of certain firearms unlawful.

Under its power over commerce with the Indian tribes, Congress may forbid the sale of liquor to any member of an Indian tribe (**United States v. Nice,** 241 U. S. 591; **Pronovast v. United States,** 232 U. S. 487; **Perrin v. United States,** 232 U. S. 478; **United States v. Sondoval,** 231 U. S. 28; **United States v. Wright,** 229 U. S. 226; **Ex parte Webb,** 225 U. S. ...) despite the provisions of the Fourteenth Amendment.

A clear illustration of the recognition of a rational distinction between the races is found in our naturalization laws as they have existed over the years. First, the privilege of naturalization was restricted to free white persons; then extended to "aliens of African nativity and to persons of African descent." 2 Am. Jur., p. 565.

As the law then stood, the words "free white persons" were construed by the court. **United States v. Bhagat Singh Thind,** 261 U. S. 204.

It was in that opinion that the Supreme Court recognized the rational basis for a classification which was construed to forbid the naturalization of a high-caste Hindu.

At page 125 of this unanimous opinion is this language, with emphasis added:

> "It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly regarded as white. The children of English, French, German, Italian, Scandinavian and other European parentage, quickly merge into the mass of our population and lose distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. **What we suggest is merely racial difference and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.**"

So wrote Justice Sutherland of Utah speaking for Chief Justice Taft, a former President of the United States, Justice McKenna of California, Justice Oliver Wendell Holmes of Massachusetts, Justice Van Devanter of Wyoming, Justice McReynolds of Tennessee, Justice Brandeis of Massachusetts, Justice Butler of Minnesota and Justice Sanford of Tennessee.

That the Congress in 1952 (8 U. S. C. 1422) amended the statute so as to eliminate the factor of race does not alter the fact that there was and is a reasonable basis for a classification according to race. That Congress as a legislative body has seen fit to remove from the statutes

the classification based on race does not destroy the reasonableness of or reasons for the classification.

At one time most of the non-Southern states and all of the Southern states had in their statutes classifications based on race which had, in the opinion of their legislatures, a rational basis.

Some of those legislatures in the course of years for varying reasons removed or modified such classifications. Their deciding to do so did not destroy the rational basis on account of which the classification had been originally made and could have remained, and on account of which certain classifications yet remain in a majority of states.

In summary, nothing was held in **Brown** that forbids the classification of school children by the application of common sense criteria and the use of value judgments reasonably related to educational purposes. The unanimous opinion of the justices in **Brown** was that, assuming that Negroes and Whites have the same "educational qualifications" (347 U. S. 492), or are "of **similar age and qualifications**" (494), separation, "solely because of their race" (494) results in injury to Negro children because separation of such children from whites "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (494). Furthermore, the court found **as a matter of fact** from the findings of a Kansas judge that separation solely because of race "is usually interpreted as denoting the inferiority of the Negro group," and the court believed from the evidence that "a 'sense of inferiority affects the motivation of a child to learn," and "has a tendency to retard the educational and mental development of Negro children" (494).

THE CONSTITUTIONAL ISSUES.

QUESTIONS NUMBERED TWO AND THREE SET FORTH ABOVE.

These questions have been answered in the affirmative many times by this Court. In **Hansberry et al. v. Lee**, 311 U. S. 32, 61 S. Ct. 115, Mr. Justice Stone answered them as follows:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. **Pennoyer v. Neff**, 95 U. S. 714, 24 L. Ed. 565; 1 Freeman on Judgments, 5th Ed., Section 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. Section 905, 28 U. S. C., Section 687, 28 U. S. C. A., Section 687, prescribe, **Pennoyer v. Neff**, supra; **Lafayette Ins. Co. v. French**, 18 How. 404, 15 L. Ed. 451; **Hall v. Lanning**, 91 U. S. 160, 23 L. Ed. 271; **Baker v. Baker, E. & Co.**, 242 U. S. 394, 37 S. Ct. 152, 61 L. Ed. 386, and **judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. Postal Telegraph-Cable Co. v. Newport**, 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215; **Old Wayne Mut. L. Ass'n v. McDonough**, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345" (Emphasis supplied).

In order to **be bound** in a federal case in accordance with the Fifth Amendment, Justice Stone said that a person, not a party of record, must be "in fact adequately represented by parties who are present" or he must:

"actually participate in the conduct of the litigation in which members of the class are present as parties, **Plumb v. Goodnow** (Plumb v. Crane), 123 U. S. 560, 8 S. Ct. 216, 31 L. Ed. 268; **Confectioners' Machinery Co. v. Racine Engine & Mach. Co.**, 7 Cir., 163 F. 914; Id., 7 Cir., 170 F. 1021; **Bryant El. Co. v. Marshall, C. C.**, 169 F. 426, or where the interest of the members of a class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. **Smith v. Swormstedt**, supra; cf. **Christopher v. Brusselback**, supra, 302 U. S. at pages 503, 504, 58 S. Ct. at page 352, 82 L. Ed. 388, and cases cited."

Intervenors in this case were not "adequately represented" in **Brown** by anyone. They did not "participate in the conduct of the litigation" leading to **Brown**. They had no "joint interest" with any of the "parties present" in **Brown**, and they bore no relationship to any of the parties in **Brown** that would entitle such parties "to stand in judgment" for them.

The law is clear that neither the doctrine of *res adjudicata* nor *stare decisis* are brought into play by a decision in a case between strangers, grounded upon findings of fact, or which **applies** an unambiguous constitutional provision to factual situations. The effect of the decision of the Fifth Circuit Court of Appeals in this case is that intervenors' rights and liberties were taken away by testimony and writings known and shown to be false, deceitful and spurious, in a proceeding in which they were not permitted to participate, and as to which they may not now complain. That is neither good law or good morals and is in the teeth of the due process clause of the Fifth Amendment. See also **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292.

The petitioners in this case respectfully insist that they have been deprived of their liberty in violation of the due process clause of the Fifth Amendment and that the denial of their right to complain compounds the unconstitutional treatment accorded to them by the Fifth Circuit.

QUESTIONS FOUR AND FIVE.

It is clear that a decision of the Supreme Court of the United States is "the law of the land" only insofar as it may **interpret** (1) a provision of the Constitution, (2) a valid treaty, or (3) a valid statute of the United States. The mere **application** of either or all is not the law of the land. Neither the **interpretation** nor the **application** of the common law by the Supreme Court is "the law of the land". **Erie Ry. Co. v. Tompkins,** 304 U. S. 64, 78. By contrast or comparison, the decision of the highest court of a state is **the law of the state** insofar as it may **interpret** (1) the state constitution, (2) a valid state statute, or (3) the common law of the state. *Ibid.*

No "interpretation" was undertaken or laid down as a basis for decision in **Brown.** At the 1953 Term of the Supreme Court the four cases underlying **Brown** and the case of **Bolling** (347 U. S. 497), were heard separately. (See 345 U. S. at page 942.) The court, on June 8, 1953, ordered all cases to be reargued and instructed the lawyers to search for evidence of whether:

> "the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated . . . that it would abolish segregation in public schools".

The lawyers hunted the evidence during the summer and came back for argument, as directed, in December. The evidence asked for and the evidence produced was solely for the purpose of enabling the Court to **interpret.** No evidence was asked to enable the Court to **apply** the

Fourteenth Amendment. By asking, the Court admitted that it needed more information in order to **interpret**—not to **apply**. The information needed was: Did the Congressmen in 1866 and the state legislators in 1868 contemplate the abolition of segregation? Such information was to be decisive or else the Court wouldn't have asked for it. After scores of lawyers toiled for months and brought in all they could find, the Court pronounced it "inconclusive" (488, 489). Since the historical evidence as to the meaning of the Fourteenth Amendment was "inconclusive" the Court could not decide the case by **interpreting**, so the Court said:

> "We must look instead to the effect of segregation itself on public education. . . . Only in this way can it be determined if segregation in public schools deprives **these plaintiffs** [in the four cases underlying Brown] of equal protection of the laws." (492, 493) (Emphasis supplied.)

The Court then turned to the evidence in those cases to determine if "these plaintiffs" [not other parties elsewhere at other times in other cases, under different circumstances] had been deprived of "equal protection of the laws".

The factual evidence in the records before the Court, showing no reason or "rational basis" for discrimination, necessarily disclosed "invidious" classification, authorizing the judgment in favor of the plaintiffs by **application**—not **interpretation**—of the Fourteenth Amendment.

We reiterate that the **application** of law to facts does not result in a judgment that is the law of the land. This Court has never said anything that should mislead any one to pronounce and apply any such doctrine that slams the door in the face of truth and undermines government by laws. As if taking heed of such constitutional heresy, the full bench in **Cooper v. Aaron**, 358 U. S. 1,

18, pointed out "that the **interpretation** of the Fourteenth Amendment enunciated by this Court in the **Brown** case is the supreme law of the land . . .". (Emphasis supplied.)

On the very next page of **Cooper** the Court seemed to limit the **application** of the Fourteenth Amendment to a situation where segregation is maintained **solely** on racial grounds, saying:

> "The right of a student not to be segregated on **racial grounds** in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law" (emphasis supplied).

In **Burnet v. Coronado Oil & Gas Co.**, 285 U. S. 393, Mr. Justice Brandeis explained the differences between **interpreting** and **applying** with that simplicity, characteristic of his writings, which the best lawyers and greatest judges covet in vain, saying:

> "In the cases which now come before us there is seldom any dispute as to the interpretation of any provision. The controversy is usually over the application to existing conditions of some well-recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary, or capricious; of cases under the equal protection clause when the question is whether there is any reasonable basis for the classification made by a statute; and of cases under the commerce clause when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct. These issues resemble, fundamentally, that of reasonable care in negligence cases, the determination of which is ordinarily left to the verdict of the jury. In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the

declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstance that the decision of that fact is made by a court, instead of by a jury, should not be allowed to obscure its real character" (pp. 410, 411).

Continuing, he said:

"The doctrine of *res judicata* demands that a decision made by the highest court, whether it be a determination of a fact or a declaration of a rule of law, shall be accepted as a final disposition of the particular controversy, even if confessedly wrong. **But the decision of the court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of stare decisis, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile.** Compare **Abie State Bank v. Bryan**, 282 U. S. 765, 772, 51 S. Ct. 252, 75 L. Ed. 690. **Moreover, the judgment of the court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned"** (p. 412) (emphasis supplied).

See also, **Landis v. North American Co.**, 299 U. S. 248, 258; **National Mutual Insurance Company v. Tidewater Transfer Co.**, 337 U. S. 582, 616, 617 (footnote 11); **Smith v. Allwright**, 321 U. S. 649; 664-665 (footnote 11); **Helvering v. Griffiths**, 318 U. S. 371, 400, 401; and **Monroe v. Pape**, 365 U. S. 167, 220-222. **The Elasticity of the Constitution**, 14 Harvard Law Review 273 (1900), cited by Justice Brandeis.

Arthur W. Machen, Jr., in the article above cited, adds clarity:

"The law of the Constitution remains forever unchanging: the facts to which it must be applied are infinitely various.

"The distinction between law and fact is, however, often so difficult and illusory that constitutional cases which really turn on matters of fact sometimes seem to establish some novel proposition of law. Hasty inferences, therefore, in regard to such matters should be avoided. For such decisions are often thought to prove that the interpretation of the Constitution may vary—a position which has already been proved untenable (14 Harvard Law Review, p. 273) . . ."

"One result of confusion of law and fact in constitutional cases is that decisions rendered upon one state of facts are cited for authority under totally different circumstances. . . . Indeed, one unfortunate consequence of the reverence of the common law for judicial precedent is the likelihood that decisions on matters of mere fact will be treated as establishing a rule of law. This is exemplified wherever a court is called upon to decide questions of fact (p. 275)."

It is respectfully insisted that the decision applying the Fourteenth Amendment to findings of fact in cases tried in Delaware or Kansas, or South Carolina or Virginia, left the Southern District Court of Georgia free to make findings of fact to which nothing in the Fourteenth Amendment may be applied to bring about the same conclusion.

A SPECIAL REASON FOR ALLOWANCE OF WRIT.

On July 6th, 1964, the Hon. S. C. Mize, U. S. District Judge for the Southern District of Mississippi, made findings of facts and rendered a decision in the school case of **Evers et al. v. Jackson Municipal District et al.**, ... Fed. Supp. ... (soon to be published).

The evidence before Judge Mize in support of separate schools for White and Negro children was overwhelming and demonstrated injury to both groups by integration beyond the shadow of doubt. In his Opinion he called "for a reappraisal and complete reconsideration of the findings and conclusions of the United States Supreme Court in the **Brown** decision." We quote from the last two pages of the Opinion:

> "Although the findings of fact and conclusions of law as set out in the foregoing opinion would require a dismissal of the complaint, this Court is mindful of the decisions rendered by the United States Court of Appeals for the Fifth Circuit on June 18, 1964, in **Stell v. Savannah-Chatham Board of Education,** No. 20,557; **Armstrong v. The Board of Education of the City of Birmingham,** No. 20,595, and **Davis v. Board of School Commissioners of Mobile County,** No. 20,657. It appears from the opinions of the Fifth Circuit in those cases that evidence similar to that presented in this case was considered by the Fifth Circuit. . . .
>
> ". . . The facts in this case are to the effect that even though there is an 'overlap' of certain Negro pupils with white pupils in achievement and aptitude, nevertheless such pupils do not progress at the same rate and therefore even though a Negro pupil and a white pupil may be similar in achievement and aptitude at the beginning of the school term, such would not hold true throughout the school year and the difference or disparity would become even more marked with each subsequent year.
>
> "Nevertheless, this Court feels that it is bound by what appears to be the obvious holding of the United States Court of Appeals for the Fifth Circuit that if disparities and differences such as that reflected in this record are to constitute a proper basis for the maintenance of separate schools for the white and

Negro races it is the function of the United States Supreme Court to make such a decision and no inferior federal court can do so. Although it is contrary to the facts and the law applicable thereto, this Court feels that it is required to enter an order making permanent the temporary injunction heretofore entered herein and denying the injunction prayed for by the intervenors in this case.

"In the opinion of this Court, the facts in this case point up a most serious situation, and, indeed, 'cry out' for a reappraisal and complete reconsideration of the findings and conclusions of the United States Supreme Court in the **Brown** decision, as interpreted by the United States Court of Appeals for the Fifth Circuit. Accordingly, this Court respectfully urges a complete reconsideration of the decision in the **Brown** case."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

.....
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APPENDIX.

In the
UNITED STATES DISTRICT COURT
For the Southern District of Georgia.

Civil Action No. 1316.

Savannah Division.

Ralph Stell, a minor by L. S. Stell, Jr., his father and next friend, et al., Plaintiffs,

v.

Savannah-Chatham County Board of Education, et al., Defendants,

and

Lawrence Roberts and Daniel Roberts, minors by Adrienne Roberts, their mother and next friend, et al., Intervenors.

OPINION AND JUDGMENT OF JUDGE FRANK M. SCARLETT.

The Issues.

This is a class action in the right of the minor negro plaintiffs as students in public schools of Savannah-Chatham County to enjoin defendant Board of Education from operating a bi-racial school system. Alternately plaintiffs pray a mandatory injunction to compel defendants to submit a plan for the admission of negro applicants to the white schools now maintained in Savannah-Chatham County.

It was alleged in the complaint that admission to the various public schools of Savannah-Chatham County is determined solely upon the basis of race and color and that plaintiffs are irreparably injured thereby.

The defendants formally denied these allegations but conceded the existence of a dual school system for white and negro students in the City and County. Defendants further pleaded certain administrative difficulties which would ensue if the relief demanded in the complaint were to be granted.

A motion to intervene on behalf of themselves and their class was made by minor white school children alleging that the separation of negro and white children in the public schools was not determined solely by race or color but rather upon racial traits of educational significance as to which racial identity was only a convenient index.

Among these significant factors for consideration in devising a rational program best suited to the peculiar educational needs of negro and white school children in separate schools were:

(a) differences in specific capabilities, learning progress rates, mental maturity, and capacity for education in general;

(b) differences in physical, psychical and behavioral traits.

The differences were alleged to be of such magnitude as to make it impossible for negro and white children of the same chronological age to be effectively educated in the same classrooms.

It was alleged that to congregate children of such diverse traits in schools in the proportion and under the conditions existing in Savannah would seriously impair the educa-

tional opportunities of both white and negro and cause them grave psychological harm.

Plaintiffs objected to the motion for intervention, stating that the decision of the Supreme Court in **Brown v. Board of Education of Topeka,** 347 U. S. 483, created a conclusive presumption of injury to negro students by reason of segregation such as to withdraw from white children or school authorities any right to show either an absence of injury from segregation in the area concerned or that compulsory integration of negro and white school children rather than segregation would cause great and irreparable injury to both.

Sitting without a jury, the court allowed the intervention and proceeded to trial, reserving any rule on plaintiffs' objection until the conclusion of the evidence.

The Trial

At the opening of the trial plaintiffs showed the maintenance of separate white and negro primary and secondary schools by the defendants and a corresponding assignment of teachers and staff. Plaintiffs offered no evidence in support of their allegation of injury to themselves from the maintenance of the dual school system. When plaintiffs rested, defendants came forward to show that reasonable inquiry was being made and hearings were being held by defendant Board on petitions for integration when the complaint herein was filed. Defendants further proved that no negro plaintiff or other student had, prior to this action or since, applied for a transfer to any white school. Defendants then rested.

Intervenors first called Dr. R. T. Osborne, Professor of Psychology and Director of the Student Guidance Center at the University of Georgia, conceded by plaintiffs to be

an authority in the field of educational psychology. Dr. Osborne stated that, on an annual basis since 1954, the County and City had, under a testing program devised by him, administered the California Achievement Battery and the California Mental Maturity Test to all students in the sixth, eighth, tenth and twelfth grades. The Battery was described as a set of nationally accepted standard achievement tests in reading comprehension and vocabulary, mathematical reasoning and fundamentals and the application of mathematical concepts. The Mental Maturity Test was described as being a nationally accepted standard indicator of the ratio between mental and chronological age, sometimes referred to as intelligence quotient or I. Q.

Dr. Osborne assisted in training the teachers to administer these tests on a uniform basis. He stated the tests were intended to evaluate achievement levels and provide specific information to counsellors, teachers and school administrators in the City and County school system. Superintendent of Schools McCormac had theretofore testified that this test program had been initiated by the City and County to adapt or accommodate the instructional program to the educational needs and abilities of individuals and student groups and to aid in counseling.

Course selection was effected by the designation of different elective subjects to be made available in each of the schools, based on student request and in consultation with school counsellors and teachers.

For test evaluation, Dr. Osborne made a comparative study of the training and experience of the teachers in the white and negro schools which showed negro teachers with more collegiate and graduate training and teaching experience, higher pay and closer supervision in their schools. The Court notes that plaintiffs have at no time made any suggestion that the schools attended by negroes in

Savannah-Chatham County are inadequate or that any differences in achievement resulted from a deprivation of educational opportunity.

The test results were analyzed by Dr. Osborne's staff at the University of Georgia and summarized in a 1962 monograph published by him.[1] These results show that major differences exist in the learning ability patterns of white and negro pupils. In reading, negro students are two school years behind the white children at the sixth grade level. This increases to a reading difference between the two or more than three school years in the twelfth grade.

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[1] *Osborne, Robert T.*: 1962: "Racial Difference in School Achievement." *Mankind Monographs*, No. III.

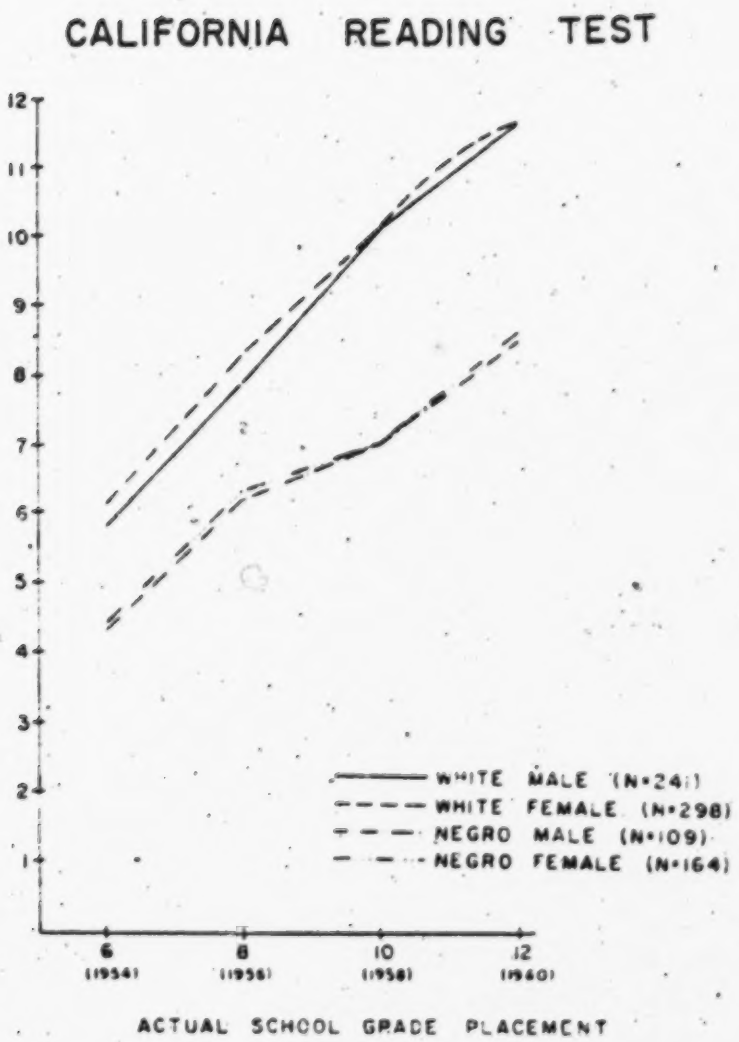

FIG. 1

rage grade placements earned on California Reading Test by White and Negro pupils tested in grades 6, 8, 10, and 12.

The test results on arithmetic show a comparable difference in the sixth grade but show an even greater variation than in reading at the twelfth grade level. The average negro pupil in the twelfth grade of the Savannah-Chatham County schools is below the eighth grade national arithmetic norm. White children who have been given the same courses tested above the eleventh grade national norm.

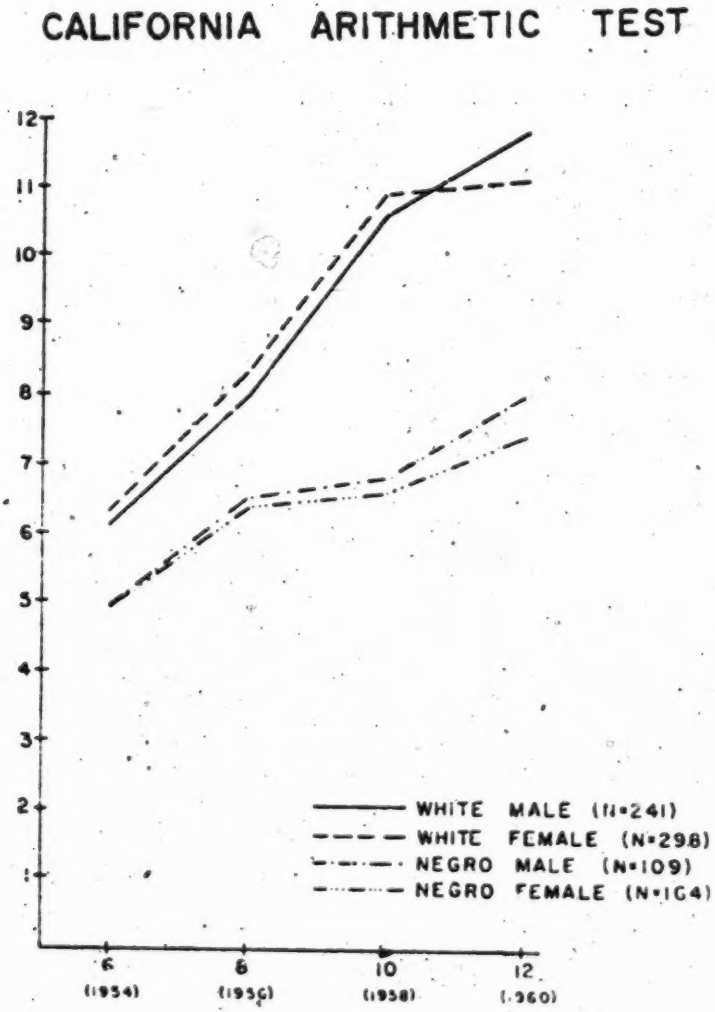

FIG. 2

rage grade placements earned on California Arithmetic Test by White and Negro pupils tested in grades 6, 8, 10, and 12.

Growth patterns can be considered separately from specific subject achievement. Learning rates are measured in terms of mental ability intelligence quotients. Learning rates were determined in Savannah-Chatham County by the California Mental Maturity Test. In sixth grade the mental age of negro students was two years behind their chronological age on the average. By the tenth grade this separation increased to a three year equivalent and remained at this point thereafter. Of the 10% of negro students who scored at or above the white median in the sixth grade, only 1% exceeded this median in the tenth grade where the white median I. Q. was 103, the negro, 81. The chart of this test follows the general pattern of the achievement results.

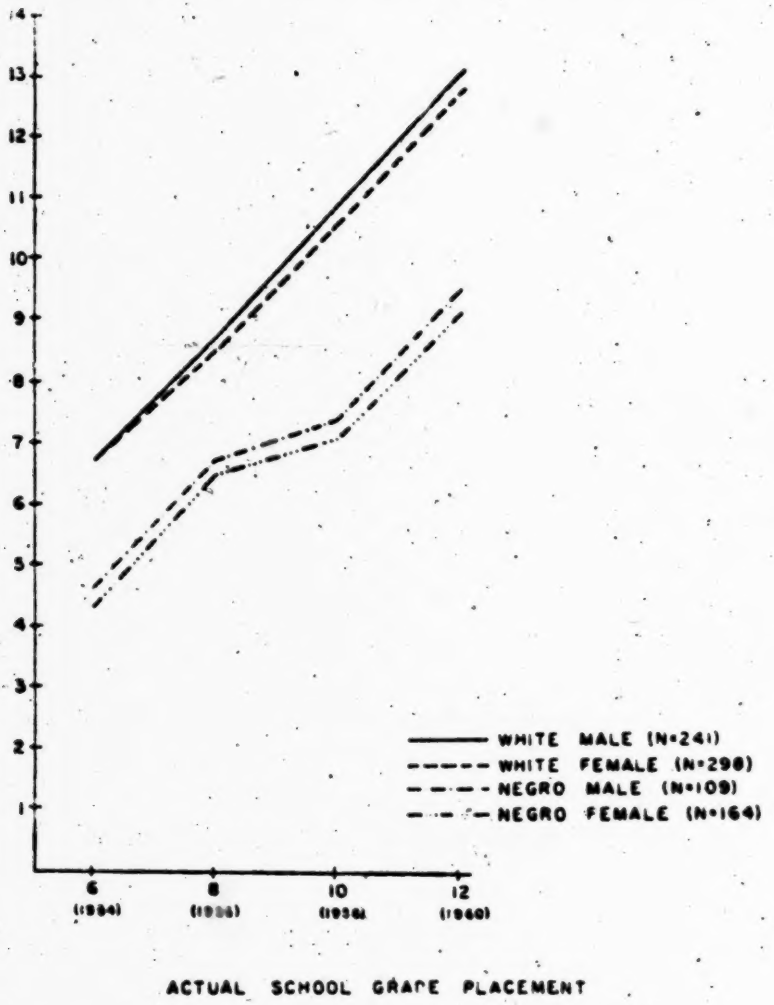

FIG. 3

erage intelligence grade placements earned on California Mental Maturity Test by White and Negro pupils tested in grades 6, 8, 10, and 12.

As an experimental control, Dr. Osborne matched the cards of all white and negro pupils of the same chronological age who had equal mental ability at the sixth grade level in 1954. Noticeable differences appeared at the eighth grade level and increased thereafter. In the tenth and twelfth grades the differences in test performance between white and negro members of the control group ranged from one to two grade placement years even though Dr. Osborne had found it necessary to select his subjects originally from the lowest quartile of the white pupils and the highest quartile of the negro pupils in order to match a sufficient number of children to give a reliable result. Confirming the pattern of the unmatched negro group, reading achievement differences were less for the negro in this group than his much greater variation in arithmetic.

Dr. Osborne stated that the differences in student capacity shown by these test results were of major importance in educational planning as they indicate the necessity for changing course content, subject selection and rate of progress planning separately for each of the two groups if the schools are to endeavor to adapt to the different learning potentials of each.

The intervenors then called to the stand Dr. Henry E. Garrett, Visiting Professor of Psychology at the University of Virginia and Emeritus Professor of Psychology at Columbia University where he was the head of the Department of Psychology and taught for more than 30 years. Plaintiffs conceded that the opinions of Dr. Garrett were authoritative in his field of experimental and differential psychology. Dr. Garrett stated that the test differences which Dr. Osborne reported in Savannah-Chatham County were of approximately the same order as those observed and reported in the nation as a whole including both Northern and Southern schools.[2] At this point in the trial

[2] Shuey, Audrey M., 1958. The Testing of Negro Intelligence. Lynchberg, Virginia: J. P. Bell.

further testimony on this point became unnecessary as plaintiffs' counsel conceded that the described differences do exist between achievement levels of white and negro pupils.

On the educational importance of learning rate variations of the magnitude shown to exist between white and negro school children Dr. Garrett testified that the differences are greater than can be effectively spanned in a single class. To attempt to cover such a range of abilities would make it necessary to either drop the achievement level of the mixed class to the point where the white children were not being educated or holding the class level up where the negro students would be frustrated by a program moving faster than their ability to learn.

Dr. Garrett pointed out that it is psychologically predictable that school failure is a source of frustration and will be compensated for by anti-social class behavior. He stated that the results predicted for a class made up of two groups of different learning rates would be quite similar to the classroom conditions reported in the District of Columbia schools following their integration in 1954.[3] The necessity for such differentiation is greatest at primary and secondary school levels where separate schooling has distinct educational advantages, lessening at collegiate and higher levels.

Dr. Garrett then gave his opinion that the differences in educability between negro and white children were inherent, and that only minor changes could be achieved by educational readjustment or other environmental change. There was no scientific possibility that learning

[3] House of Representatives, Eighty-fourth Congress, Second Session 1957. District of Columbia Subcommittee to Investigate Public School Standards and Conditions, and Juvenile Delinquency in the District of Columbia, "Investigation of Public School Conditions."

rate differences of the degree shown by Dr. Osborne's tests and the confirming national studies were either caused by or could be substantially altered by the students' environment.[4] In support of this thesis Dr. Garrett described tests of white and negro groups where social and environmental factors had been equated without changing the results,[5] and cited the larger percentage of individuals of mixed inheritance in the higher score areas of negro testing. On this genetic or inheritance basis of ability patterns, the witness further referred to studies made over a 35-year period in Wilmington, North Carolina, showing identical nineteen point negro-white student test differences in 1925 and 1960 despite intervening improvement of the economic and educational conditions of the negro families of that city.

The next witness was Dr. Wesley Critz George, Emeritus Professor of Histology and Embryology in the School of Medicine at the University of North Carolina. Dr. George confirmed Dr. Garrett's opinion that the variations in intellectual abilities between negro and white students

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[4] Garrett, Henry E. 1960. "Klineberg's Chapter on Race and Psychology: A Review." *The Mankind Quarterly*. Vol. I No. 1.
Burt, Cyril. 1958. "The Inheritance of Mental Ability." The American Psychologist. Vol. 13 No. 1, pp. 1-15.

[5] McGurk, Frank C. J. 1956. "A Scientist' Report on Race Differences." *U. S. News & World Report*. Sept. 21, 1956, pp. 92-98.
Shuey, Audrey M. 1942. "A Comparison of Negro and White College Students by means of the American Council Psychological Examination." *Journal of Psychology*. Vol. 14, pp. 35-52.
Garrett, Henry E. 1962. "The SPSSI and Racial Differences." *The American Psychologist*. Vol. 17, pp. 260-263.
Tanser, H. A. 1939. *The Settlement of Negroes in Kent County, Ontario, and a Study of the Mental Capacity of their Descendants*, Chatham, Ontario: Shepherd Publ.
Kennedy, Wallace A.; Van De Riet, Vernon; White, James C. 1961. "The Standardization of the 1960 Revision of the Stanford-Binet Intelligence Scale on Negro Elementary-School Children in the Southeastern United States." U. S. Dept. of Health, Education and Welfare, Office of Education, Cooperative Research Branch Project 954.

were innate and described them as being functionally related in both a quantitative and qualitative degree to physical characteristics which are anthropologically accepted as distinctive variances between the two races. The morphological distinctions referred to were differences in size, proportion and structure of the brain and endocrine systems which, within scientific limitations, compel predictable differences in personality and learning capacity of the type shown in the test results reported by Dr. Osborne and Dr. Garrett.[6].

It was Dr. George's opinion that the genetic basis of variations in educability is confirmed by the identical test results shown by random groups and selected groups matched for social and other environmental factors. In terms of the issue before this Court, his testimony indicated that no change of instructional program such as remedial classes could equate the two groups for subsequent parallel or combined school progress.

Intervenors then produced Dr. Ernest van den Haag, a Professor of Social Philosophy at New York University and lecturer on sociology and social philosophy at the New School for Social Research. As with the other witnesses presented by the intervenors, plaintiffs conceded that Dr. van den Haag was an authority in his field. This witness reviewed for the Court a number of educational studies which investigated sources of group conflicts in

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[6] Coon, Carleton S. 1962. *The Origin of Races*. N. Y.: Alfred A. Knopf.

Gates, R. Ruggles. 1946. *Human Genetics*. N. Y.: *The MacMillan Co.* Vol. II., pp. 1137, 1138 and 1139.

Connolly, Cornelius J. 1950. *External Morphology of the Primate Brain*. Springfield, Illinois: Charles C. Thomas.

Peale, Talmadge. 1961. *The Neuro-Anatomical Basis for Clinical Neurology*.

Bean, Robert B. 1906. "*Some Racial Peculiarities of the Human Brain.*" *American Journal of Anatomy*. Vol. 5, pp. 353-432.

Penfield, Wilder and Rasmussen, Theodore. 1957. The *Cerebral Cortex of Man*. New York: The Macmillan Co.

the classroom and the patterns of association among students which affect their educational achievement.[7] These studies, in whose conclusions Professor van den Haag concurred, show that inter-racial associational distinctions arise spontaneously in pre-school children without regard to whether they live in an area of segregated or integrated schooling.[8] This is one aspect of group identification which every individual makes. Such identifications occur by sex, profession, interests or other common characteristics. Among children, such identification is strongest in areas involving visual distinctions and between negro and white infants takes the form of racial preference in group association. Such group selection

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[7] Lundberg, George A. 1952. "Selective Association Among Ethnic Groups in a High School Population." *American Sociological Review*. Vol. 17, No. 1, pp. 23-35.

Goodman, Mary E. 1946. "Evidence Concerning the Genesis of Interracial Attitudes." *American Anthropologist*. Vol. 48 No. 4, pp. 624-630.

Clark, Kenneth B. and Clark, Mamie. 1952. "Racial Identification and Preference in Negro Children." in *Readings in Social Psychology*. New York: Henry Holt and Co., pp. 551-560.

Davis, Allison. 1943. "Racial Status and Personality Development." *The Scientific Monthly*. Vol. 57, pp. 353-360.

Hill, Mozel C. 1946. "A Comparative Study of Race Attitudes in the All-Negro Community in Oklahoma." *Phylon*. Vol. 7 No. 3, pp. 260-268.

Pugh, Roderick W. 1943. "A Comparative Study of the Adjustment of Negro Students in Mixed and Separate High Schools." *Journal of Negro Education*. Vol. 12 No. 4.

Stember, Chas. H. 1961. *Education and Attitude Change*. New York: Institute of Human Relations Press.

[8] Dr. Kenneth B. Clark, NAACP psychologist wrote on preschoolers in 1939:

> "In general, the tendency to identify with either the colored or the white boy seems to approximate a chance frequency among those Negro children in nursery schools where there are both white and colored children, while a trend toward identifying with the colored boy is more pronounced in the Negro children in the semi-segregated group and even more so in the all-Negro nursery schools."

Segregation as a Factor in the Racial Identification of Negro Pre-School Children: A Preliminary Report; Jour. of Exper. Educ. Vol. III, No. 2, Dec. 1939.

continues into and through the primary and secondary school ages gradually becoming less compelling thereafter as the individual matures.[9]

According to this witness, any group having self-identification or associational preference closes its ranks in the presence of other groups. Prejudices, whether ethnic, religious or racial, increase rather than decrease in proportion to the degree of non-voluntary contact between separately identifiable groups. This is a psychological phenomenon which was noted in the time of Periclean Greece. Studies made of actual intermixing of groups in classrooms confirm the predicted result that an increase in cross-group contacts increases pre-existing racial hostility rather than ameliorates it. This group tension effect is greatest where obvious group identity criteria exist, such as physical appearance or variations in learning rate. Such groupings prevent a class having a natural homogeneity, multiply disciplinary problems in the classroom, and decrease attention to study.[10]

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[9] Radke, Marion; Sutherland, Jean; and Rosenberg, Pearl. 1950. "Racial Attitudes of Children." *Sociometry*, Vol. 13 No. 2, pp. 154-171.

> "The white children in all situations and at all ages express strong preference for their own racial group. This is particularly the case when the choice is between Negro and white children."

Hofstaetter, P. R. 1951. "A Factorial Study of Cultural Patterns in the U. S." *Journal of Psychology*. Vol. 32, p. 105.

[10] On comparative educational results from homogenous and mixed classes, counsel for plaintiffs in this case, Jack Greenberg, in his book, "Race Relations & American Law" (1960) wrote that 2.5-4.4% of Negro high school graduates in Southern separate schools attained national college admission standards whereas in a survey of 50 leading Northern integrated high schools having a 30% Negro enrollment, less than .2% of Negro graduates could meet these scholarship standards. This effect on Negro education of mixed schools is confirmed by Dr. Kenneth B. Clark, NAACP psychologist who recently said:

> "The bulk of the Negro youngsters who are being turned out of these segregated Northern schools are functional il-

Dr. van den Haag stated that acceptable group identifications are essential to the well-being of the individual. Any attempt to de-identify one's self with a natural grouping would be harmful. As to the nature of the resulting injury, Dr. van den Haag quoted from Professor Gustav Ichheiser of the University of Chicago that:

> ". . . if the negroes would refuse to identify themselves consciously with other negroes as a sub-group, then they would develop a kind of collective neurosis as to other minorities, too, for the conscious 'we' would in case of such an attitude be persistently in conflict with the unconscious 'we' and this inner split would inevitably reflect itself in different pathological distortions of the negro personality."[11]

A further conclusion of Dr. Ichheiser was described as being that the aim of negro education should be to strengthen the degree to which negroes identify with their own sub-group rather than with other groups.

This principle was considered by the witness in its application to special or selective transfers from one identifiable student group to another. This affects the question whether superior negro students sufficiently above the general average of their group to have the intellectual capacity to meet the progress rate of the white classes should be transferred to the latter. Where such

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literates. They have not been taught to read or speak well, they are deficient in arithmetic."

(*U. S. News & World Report*, 6-10-63, p. 39).

Dr. Clark's reference to these mixed schools as "segregated" arises from his further contention that there is in those schools a "de facto segregation equal to that which exists in the South." Dr. Clark in the interview suggested special remedial classes for Negroes in Northern schools, in effect a suggestion of resegregation as an educational necessity.

[11] Ichheiser, Gustav. 1949. "Sociopsychological and Cultural Factors in Race Relations." *The American Journal of Sociology*, Vol. 54, No. 5, pp. 395-399.

individuals are a small percentage only, the increase in interracial contact is insufficient to compel any substantial change in the disciplinary pattern of the classroom or in the attitude of the majority student group. The problem from the standpoint of psychological and educational injury is the problem of the negro student who is transferred and those of his race who cannot meet the transfer standard.

As to the individual, Dr. van den Haag testified that the sense of achievement essential to a healthy personality in a superior pupil is caused by excelling in a group with which he has a strong identification. This is limited or destroyed by placing him in a group with which such identification is lacking and whose progress rate is such as to diminish his own relative accomplishment. Additionally a pathological disturbance of the type described by Dr. Ichheiser occurs through the conflict between the transferred student's deep identification with other negro children and the simultaneous necessity of attempting to identify with a student group which could not be expected to accept him.

Dr. van den Haag testified that the effects upon the slower negro group would be even more serious than the injury to the transferred individual. Such children would be deprived of the natural leadership of their group, would lose a sense of group achievement, be subjected to a demoralizing sense of rejection and with the consequent drop in their achievement level would suffer feelings of inadequacy or inferiority. Such a selective sifting would heighten any existing contrast between the two groups in the minds of each and substitute a definite superior-inferior comparison for the naturally occurring negro-white consciousness.

The conclusions of Drs. Garrett and van den Haag as to the psychological results of academic frustration in

negro-white classes was confirmed by the experience of the witness Dr. Clairette P. Armstrong, for some years Psychologist of the Children's Court in New York and previously on the staff of the Chief Psychologist at Bellevue Hospital in that City. Dr. Armstrong's clinical work with delinquent boys revealed that one-third of all negro truants gave inability to keep abreast of their school work as the reason for their running away from home.[12]

Dr. Armstrong's conclusion on the basis of her work with disturbed children was that a classroom organized around a socially homogenous group of children having relatively similar learning rates could noticeably diminish the incidence of truancy and decrease attention diverting anti-social incidents.

Intervenors proffered three additional scientists whom they had brought to court but when plaintiffs' counsel announced that they would submit no evidence in contradiction of the existing proof, these witnesses were withdrawn as cumulative.

The proofs closed, plaintiffs renewed their objection of irrelevancy and moved to strike the evidence submitted by intervenors. The plaintiffs' position is not unambiguous. During trial plaintiffs' counsel conceded that such evidence could be admissible at a trial on the merits of these issues, but although the Court stated that this was a trial, counsel insisted that in their opinion nothing more was being heard than plaintiffs' motion for a preliminary injunction. Apparently plaintiffs abandoned this position at some later time and the Court assumes, for the purposes of the

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[12] Armstrong, Clairette P. 1932. *660 Runaway Boys: Why Boys Desert Their Homes.* Boston: Gorham Press. p. 208. 1945. "A Note on the Attainment of Delinquent Boys." *School and Society.* Vol. 61, pp. 29-32. 1945. "Some Comparisons of Negro and White Delinquent Boys." *Journal of Genetic Psychology.* Vol. 67, pp. 81-84. 1937. "A Psychoneurotic Reaction of Delinquent Boys and Girls." *Journal of Abnormal Social Psychology.* Vol. 32, pp. 329-42.

present opinion that the objection taken is to all evidence tending to show injury caused by, or educational advantages of, separate schooling for negro and white children in Savannah-Chatham County.

In stating the basis for the objection to this evidence, counsel for plaintiffs said:

> "'. . . the law is settled by the Supreme Court in the **Brown** case that segregation itself injures negro children in the school system. That is what the Supreme Court's decision is all about, so we do not have to prove that."

A ruling on plaintiffs' objection therefore made it essential to consider the legal parameters of the Supreme Court's **Brown** decision.

Brown v. Board of Education, 347 U. S. 483 (1954).

I.

The binding effect of any decision is legally a problem of privity of party or precedent, of prior adjudication or estoppel. Under the principles of *res judicata* and *stare decisis* fall most of the rules which govern these concepts.

As to parties and privies the final decision in **Brown** or in any court of final jurisdiction is *res judicata*, that is to say it is a conclusive adjudication as to all questions determined by the Court, whether of law or of fact. **Kessler v. Eldred**, 206 U. S. 285; **Hart Steel Co. v. Railroad Supply Co.**, 244 U. S. 294; **Hale v. Finch**, 104 U. S. 261; **Hansberry et al. v. Lee**, 311 U. S. 32; **Kean v. Hurley**, 179 F. 2d 888; 28 U. S. C. A., Rule 65 (d).

The general principles are set forth by Mr. Justice Stone in **Hansberry v. Lee**:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a

> judgment in *personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. **Pennoyer v. Neff**, 95 U. S. 714, 24 L. Ed. 565; 1 Freeman on Judgments, 5th Ed., §407 . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires" (p. 40). . . .
>
> . . .
>
> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it" (p. 41).

However, for one to be bound in a "class" suit, "adequate representation" is an absolute essential. On that point Mr. Justice Stone continued:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter" (p. 42).

Since intervenors were not parties to nor members of any class represented by defendants in **Brown**, it follows that **Brown** does not bind them under the doctrine of *res judicata*.

While *res judicata* applies to decisions of both law and fact, *stare decisis* is applicable only on questions of law and relates generally to all causes subsequently arising in the same or an inferior court. It applies as well to strangers as to privies. 21 C. J. S. 305, 386; 14 Am. Jur. 290. Under this principle therefore this Court is bound by the decision in **Brown v. Board of Education** to the extent that it states rules of law. It has no application to any determinations of fact in that case. **Armour & Co. v. Wantock**, 323 U. S. 126; **Commissioner of Internal Revenue v. Jergens**, 127 F. 2d 973 (5th Cir.).

In the case of **Quon v. Niagara Fire Ins. Co. of New York**, 190 F. 2d 257, 260, the rule was stated by the Ninth Circuit Court of Appeals in this way:

> ". . . the judgment of fact of one court on a particular record cannot bind another court, or even the same court, to make a similar finding on a different record. The imponderables such as credibility and inferences crowd upon one judging of facts."

In **Partos v. Pacific Coast S. S. Co.**, 95 F. 2d 738, 742, the same court aptly illustrated the rule:

> "Even if, on the identical complicated probative facts and contradictory testimony in another case . . ., another court found seaworthiness as an ultimate fact, it would not prevent us from weighing the evidence and making the contrary finding."

II.

It is therefore apparent that the governance of the present issues by **Brown** is the question of whether the applicable portion of the determination in that case—the injury occurring through segregation as plaintiffs put it—is a finding of fact or a conclusion of law. For this let us look to the words and record in **Brown**.

Several courts which have previously considered this question have concluded that the decision in **Brown** is in large part based on questions of fact contained in four case records before the Supreme Court. **Taylor v. Board of Education of New Rochelle**, 191 F. Supp. 181 (1961); **Calhoun v. Board of Education of Atlanta**, 188 F. Supp. 401, 409 (1959); **Frasier v. Board of Trustees of N. C. Univ.**, 134 F. Supp. 589, 592 (1955).

In **Brown** the Supreme Court stated for itself the nature of its inquiry:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (p. 493)

Although it would appear sufficiently clear on its face that this calls for a conclusion of fact rather than law, we are confirmed when we find that Court looking to the testimonial and other evidence in the records before it and to a submission of scientific opinion rather than seeking the answer to this question in the law books.

From the Kansas record, the Court read:

> ". . . the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

These are facts, not law. To make these findings the Kansas District Judge considered evidence—not cases.

Whether negroes in Kansas believed that separate schooling denoted inferiority, whether a sense of inferiority affected their motivation to learn and whether motivation to learn was increased or diminished by segregation was a question requiring evidence for decision. That was as much a subject for scientific inquiry as the braking distance required to stop a two-ton truck moving at ten miles an hour on dry concrete.

Again, the Supreme Court quoted the record that negro children in Delaware were "receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated" (Ftn. 10, p. 484), a statement which could only be of factual rather than legal significance.

The Supreme Court put at rest any residual question on the nature of its inquiry when it indicated it reliance on scientific information:

> "Whatever may have been the extent of psychological knowledge at the time of **Plessy v. Ferguson**, this finding is amply supported by modern authority" (*id.* 494).

The teachings of psychology in 1896, in 1954, or in 1963 are inquiries requiring evidence in the same sense as repeated determinations of "seaworthiness." Actually, the non-legal authority to which the Court referred was neither testimonial nor documentary in character but came from a "Brandeis" type brief filed directly in the Supreme Court by the National Association for the Advancement of Colored People. The possible significance of this authorship is considered in the next point.

It was only after marshalling these facts and considering the statements of "modern authority" that the Court came to the conclusion that the minor negro plaintiffs in

in those cases were injured by segregation and thereby "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment" (p. 495).

The Court holds that the existence or non-existence of injury to white or black children from integrated or segregated schooling is a matter of fact for judicial inquiry and was so treated in **Brown.**

The factual nature of the finding of injury through segregation in **Brown** opened the door to the proof which intervenors have made in this case and plaintiffs' objection was overruled.

III.

Even though this Court would, in the usual case, feel justified if not constrained at this point in accepting without further review the uncontroverted testimony on scientific issues given as the unanimous opinions of conceded authorities open to cross-examination on the witness stand, the Court is not unaware that the **Brown** findings on the issue of injury are to the contrary of this evidence. Some inquiry is therefore indicated as to the possible reasons for this apparent disagreement of psychological authority.

The scientific testimony in the records before the Supreme Court in **Brown** is exemplified by that of the witness Dr. Robert Redfield submitted in the underlying case of **Briggs v. Elliott.** There Dr. Redfield testified (p. 160 of Record):

> "The conclusion, then, to which I come, is differences in intellectual capacity or in ability to learn have not been shown to exist as between negroes and whites, and further, that the results make it very probable that if such differences are later shown to exist, they will not prove to be significant for any educational policy or practice."

That statement is directly contrary to all of the proof in the present case and to all of the studies which have been called to the Court's attention by intervenors. It is difficult for the Court to believe that when Dr. Redfield swore that differences in intellectual capacity or ability had not prior to that time been shown to exist as between negroes and whites, he could have been unaware of such contemporaneous common references on the subject as the Encyclopedia Britannica (14th Ed.). There, in the article on "Differential Psychology" a number of studies on the subject are referred to, all to the effect that the variations shown in this case did exist. The quoted portion of Dr. Redfield's statement indicates he may not have been altogether unaware of the contradiction between his testimony and the state of public knowledge in his field at that time. As to Dr. Redfield's conclusion as to the absence of educational significance of any variation yet to be shown, the statement is at best speculative. The gross differences now shown are of obvious educational significance apart from the supporting testimony to that effect.

The Court is not aware of any other source of information placed before the Court in **Brown** which referred either to the existence of such differences or to their educational significance.

More directly, in the present case Mrs. Motley, trial counsel for these plaintiffs and, as the Court is given to understand, one of the NAACP legal assistants for plaintiffs in the **Brown** proceedings, has conceded on this record that the negro-white learning rate differences described by Drs. Osborne and Garrett do exist in fact. In this respect certainly the present case differs in its facts from **Brown** and it is from this fact that serious educational considerations arise.

The Supreme court in **Brown** also had placed before it statements by scientists that separate schooling caused psychic injury to the negro child. Here again the evidence in this case shows the contrary to be the fact. In this case, each witness testified that no such injury had been observed by him and in fact a dual school system is more favorable to the children involved in a psychological sense, avoids the injurious conflict arising from loss of racial identity, and results in a more successful educational program for the students of both races.

The Supreme Court in **Brown** referred to the current state of "psychological knowledge" as the basis for its finding of injury from separate schooling. It footnoted this statement with a number of references which were reviewed in this case by Dr. van den Haag. He pointed out that one of the items, "Personality in the Making" contradicted the conclusion for which it was cited and that others were either written by or relied on Dr. Kenneth B. Clark who also appeared in person as a witness in the **Brown** case on the same issue. Not only was Dr. Clark the first authority cited by the Supreme Court in the footnote (11) but he was the only witness in that case who testified on the basis of tests conducted by himself.[13]

Apart from various experimental fallacies described as scientifically invalidating Dr. Clark's conclusions as to injury from segregation, the Court considers most significant testimony that the test on which Dr. Clark relied for much of his oral testimony, and conclusion in **Brown**, was a test of only 16 children in a segregated school area showing a result directly contrary to an earlier test of 300 children in both separate and mixed schools. It was fur-

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[13] Ross and Van den Haag. *The Fabric of Society* (1957), 163-66.

Van den Haag, Ernest, *Social Science Testimony in the Desegregation Cases. A Reply to Kenneth Clark*, Villanova, L. R., Vol. 6, No. 1 (Fall, 1960).

ther stated that Dr. Clark had made the later test and limited it to 16 selected children for the purpose of affording a basis for his conclusions in **Brown.**

On the earlier test Dr. Clark had expressed a much more detailed opinion:

> "The children in the northern mixed school situation do not differ from children in the southern segregated schools in either their knowledge of racial differences or their racial identification.
>
> "The southern children in segregated schools are less pronounced in their preferences for the white doll [i.e., less injury from loss of racial identity] as compared to the northern unsegregated children's definite preferences for this white doll. Although most are in the minority, a higher percentage of the southern children, compared to the northern children, prefer to play with the colored doll and think that it is a nice doll."

And, describing the mental disturbance, which is the type of injury with which both the Supreme Court and this Court are principally concerned, Dr. Clark confirmed the results predicated by Dr. Ichheiser:

> ". . . some of the children who were free and relaxed in the beginning of the experiment broke down and cried or became somewhat negativistic during the latter part when they were required to make self-identifications. Indeed, two children ran out of the testing room, unconsolable, convulsed in tears. This type of behavior, although not so extreme, was more prevalent in the North than in the South. The southern children generally indicated their disturbance by smiling or matter of factly attempting to escape their dilemma either by attempted humor or rationalization." (from "Racial Identification and Preference in Negro Children", see footnote 7, *supra*)

The Court is inclined to accept this earlier scientific opinion of Dr. Clark not only because of the broader test basis used but because it is directly confirmed by all the evidence presented in this case.

The National Association for the Advancement of Colored People furnished representation for plaintiffs both in the **Brown** cases and in this case. The Court is advised that both Dr. Redfield and Dr. Clark were employed or retained either regularly or occasionally by that organization. Plaintiffs were aware from intervenors papers of the nature of the intended contradiction of the earlier testimony of these two scientists. Presumably, plaintiffs could have shown supporting authority on this point had they wished. The Court must assume that the truth here lies on the side of the evidence of injury given in this case rather than that given in **Brown.**

In the Exhibit "Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate," 87th Congress, 2nd Session, pp. 166-178, appears a speech made by Dr. Alfred H. Kelly of Wayne State University in which he described in some detail how he helped to present the **Brown** case to the Supreme Court. In part he said:

> "It is not that we were engaged in formulating lies; there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts, and above all interpreting facts in a way to do what [Thurgood] Marshall said we had to do—'get by those boys down there.'"

The Supreme Court has on other occasions itself withheld or recalled earlier determinations where evidence had been shown to have arisen more from the necessities of counsel than the compulsion of fact. **Hazel-Atlas Glass Co. v. Hartford-Empire Co.**, 322 U. S. 238, 64 S. Ct. 997;

Shawkee Mfg. Co. v. Hartford-Empire Co., 322 U. S. 271, 64 S. Ct. 1014. See also 28 U. S. C. A. 60.

The Court accordingly accepts the evidence given in the present case as having somewhat stronger indicia of truth than that on which the findings of potential injury were made in **Brown.**

Reasonable Classification.

Finally, even though the Court accepts intervenors' proof, it still must answer the question whether racial traits of compelling educational significance constitute a reasonable basis for classification under the police power of the State within the limitations of the Fourteenth Amendment to the Constitution.

Both before and since **Brown** the Supreme Court has consistently adhered to the principles laid down in **Lindsley v. Natural Carbonic Gas Co.**, 220 U. S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369, more recently quoted and followed by the Court in **Morey v. Doud** (1957), 354 U. S. 457, 77 S. Ct. 1344, which is here quoted because of its clarity:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails

> the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. **Lindsley v. Natural Carbonic Gas Co.**, 220 U. S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369."

Among the many cases stating and applying those well known classification rules under the Fourteenth Amendment are, **Williamson v. Lee Optical of Oklahoma, Inc.**, 348 U. S. 483 (1955); **Hoyt v. Florida**, 369 U. S. 57 (1961); **McGowan v. Maryland**, 366 U. S. 420 (1961); **Hernandez v. Texas**, 347 U. S. 475, 478 (1954).

In the latter case, decided before **Brown**, Mr. Chief Justice Warren pointed out that race and color may serve as a convenient index for differentiating between groups. Continuing, he said:

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Two weeks later the same Court and Judge in **Brown** did not hold that it is a violation of the equal protection clause to separate negro children from white children, *per se*. What it did hold was that under the facts in the records before the Court it was a violation of the equal protection clause to separate whites and negroes "**of similar age and qualifications solely** because of their race" (p. 494).

Writing two years after **Brown**, Mr. Justice Douglas recognized the legal importance of the distinction between race as such and a racial trait saying in his book "We the Judges" that "regulations based on race may . . . be justified by reason of the special traits of those races" (p. 398).

Similarly, the Court of Appeals of this Circuit, noting the absence of any relevant criteria for racial separation in **New Orleans Parish School Board v. Bush**, 242 F. 2d 156 (1957), specifically called attention to the lack of evidence of "any reasonable classification of students according to their proficiency or health . . ."

In this case that lack has been supplied and the Court holds that a classification based on racial traits directly concerned with proficiency and mental health is a reasonable one within the intendment of the equal protection provisions of the Constitution.

On the law these pupils of both races in Savannah-Chatham County are entitled to the best education available and on the unassailable facts that education is best given in separate schools adapted to their varying abilities. On the mandate of that law this Court gives judgment dismissing the complaint.

Findings.

The Parties.

1. The minor plaintiffs are negro students in primary or secondary schools of Savannah-Chatham County. The minor intervenors are white students in the primary or secondary white schools of Savannah-Chatham County. The defendant Board of Education and the individual defendants are in control of and administer the primary and secondary public schools in Savannah-Chatham County and have the necessary authority to place in effect any orders of this Court with respect thereto.

The Schools.

2. The primary and secondary public schools of Savannah-Chatham County are divided into schools for white pupils and schools for negro pupils and admission thereto is limited to applicants of the respective races.

3. The teaching and administrative staffs of the white and negro schools are white and negro respectively up to and including the direct assistants to the Superintendent of Schools. Principals of both negro and white schools are part of the Superintendent's staff and participate in the adaptation of their particular schools to pupil requirements and the educational effectiveness of the several parts of the school system. The schools are equal in all respects except as to a slight advantage in favor of the negro teaching staff in terms of graduate training and salaries. The same total curriculum is made available to all schools. Responsiveness to the aptitudes and needs of the pupils in each is secured by arranging a choice of elective subjects to be selected by the school on the basis of student request and guidance counseling.

Student Test Grouping.

4. All pupils in three significant grades of the Savannah-Chatham County school system have been tested annually since 1954 for psychometric intelligence and correlative academic achievement through a battery of nationally accepted tests administered by local personnel, supervised and processed by the University of Georgia. This program was initiated prior to May, 1954 at the request of the Superintendent of Schools for Savannah-Chatham County as part of a comprehensive study of mental growth and school achievement for pupil placement and course selection and content recommendations. The result of this testing program has been considered by the Savannah-Chatham County Board of Education in arranging school curricula responsive to the abilities and learning characteristics of the two student groups.

5. The psychometric test results have conclusively demonstrated that the differences between white and negro students in learning capabilities and school performance vary in increasing degree from the pre-school period

through the completion of high school. The differences between white and negro students were consistent on all types of tests and increased with chronological age at a predictable and constant rate. The negro overlap of the median white scores dropped from approximately 15% in the lowest grades to 1-2% in the highest and indicated that the negro group reached an educational plateau as much as four years before the white group. When a special control group was selected for identity of age and intelligence quotient in the lower grades, the negro students lagged by two to four years when the entire group reached the 12th grade.

6. The tests covered general intelligence, reading and arithmetic achievement, and mental maturity. On the last, the white average was 22 points above the negro average. The achievement tests showed major ability pattern differences. On reading comprehension and arithmetic fundamentals there was virtually no overlap between the two groups.

Basis of Test Variations.

7. These differences in test results in Savannah-Chatham County are not the result of the educational system or of the social or economic differences in status or in environment of the students. These test results agree on a point for point basis with substantially identical results obtained from similar tests made in other areas of this country and abroad and in both segregated and integrated situations. Additionally quantitative and qualitative distinctions in Savannah-Chatham County and other test results have shown the same variation in learning rates between the two ethnic groups even after the socio-economic factors of the test students had been equated.

8. All the evidence before the Court was to the effect that the differences in test results between the white and

negro students is attributable in large part to hereditary factors, predictably resulting from a difference in the physiological and psychological characteristics of the two races. The evidence establishes and the Court so finds that of the twenty-point difference in maturity test results between negro and white students in Savannah-Chatham County a negligible portion can be attributed to environmental factors. Furthermore no evidence whatsoever was offered to this Court to show that racial integration of the schools could reduce these differences. Substantially all the difference between these two groups of children is inherent in the individuals and must be dealt with by the defendants as an unchangeable factor in programming the schools for the best educational results.

Group Integration.

9. The students in Savannah-Chatham County schools are 60% white, 40% negro. A school class mixed on this basis would have a median progress rate 12 points below that of the former white class, and 8 points above the progress rate of the comparable former negro class. Two thirds of the negro students would fail in this situation, particularly in the upper grades. This would place in the same schoolroom negro students two to four years older in chronological age than the white students. White students in such a class lose any challenge to further academic accomplishment.

10. Failure to attain the existing white standards would create serious psychological problems of frustration on the part of the negro child, which would require compensation by attention-creating antisocial behavior. In other cities this effect has created serious discipline problems for the teachers and school administrators with consequent loss of schooltime. In New York 37% of negro truants questioned in a study stated that they had run away from home because of failure to keep up in school.

11. The congregation of two substantial and identifiable student groups in a single classroom, under circumstances of distinct group identification and varying abilities would lead to conflict impairing the educational process. It is essential for an individual to identify himself with a reference group for healthy personality development. Physical and psychological differences are the common basis of group identification, indeed they compel such self-identification. To increase this divisive tendency, it has been established without contradiction, that selective association is a universal human trait; that physically observable racial differences form the basis for preferential association and that patterns of racial preference are formed and firmly established at a pre-school age.

12. The effects of intergroup association are reasonably predictable on the basis of that branch of psychology known as social dynamics. In the case of two identifiable groups in the same classroom, intergroup tensions and conflicts result. These become substantial when the groups have a high identification index in a situation where the difference between them is as great as that existing between white and negro children in the Savannah-Chatham County schools.

13. In each city referred to in the evidence where large scale integration had taken place or had existed continuously, the predicted level or even a greater degree of conflict existed and substantially impaired the efficacy of the entire educational system.

14. Total group integration as requested by plaintiffs would seriously injure both white and negro students in the Savannah-Chatham County schools and adversely affect the educational standards and accomplishments of the public school system.

Selective Integration.

15. Throughout the trial, counsel for plaintiffs emphasized the conceded ability of certain superior negro children to meet the progress norms of the white classes and implied that at least selective transfers of such students to white schools would not cause injury similar to the effects of group integration. The Court finds that such selective integration would cause even greater psychological harm to the individual negro children involved and to the balance of their group.

16. Negro children so transferred would not only lose their right of achievement in their own group but would move to a class where they would be inescapably conscious of total social rejection by the dominant group. Such children must try to identify themselves with the white children while unable to free themselves from continuing identification with other negro children. Additionally, the children involved, while able to maintain the rate of the white class at first, would, according to all of the test results, thereafter tend to fall further back in each succeeding term.

17. The effects on the remaining negro children would be even more injurious. The loss of the better group members would greatly increase any existing sense of inferiority. The competitive drive to educational accomplishment for those not transferred would be taken away. The Court finds that selective integration would cause substantial and irremovable psychological injury both to the individual transferee and to other negro children.

Segregation Injury.

18. Plaintiffs assumption of injury to negro students by the continuance of segregated schools is not supported by any evidence in this case. Whatever psychological injury may be sustained by a negro child out of his sense of re-

jection by white children is increased rather than abated by forced intermixture, and this increase is in direct proportion to the number and extent of his contacts with white children.

19. Each study presented to the Court, confirmed by the opinions of the witnesses showed that the damaging assumptions of inferiority increase whenever the child is brought into forced association with white children. The principal author of the studies relied on by the Supreme Court in the **Brown** case came to the conclusion that compulsory intermixture rather than racial separation in school was the principal source of the damaging loss of race identification.

20. The adverse effects of compulsory congregation are particularly harmful in the early formative school years. Intervenors' witnesses noted that the adverse effects of educational integration at higher levels lessens to some degree. The findings herein are limited to children of primary and secondary school ages.

CONCLUSIONS.

1. The white and negro school children have equivalent rights before this court, and are equally entitled to be considered in determining the scope and content of constitutional rights.

2. A reasonable classification within the meaning of the equal protection clause of the Constitution would be one which secures the maximum result in the educational process for all students and the minimum injury to any.

3. The classification of children in the Savannah-Chatham County schools by division on the basis of coherent groups having distinguishable educability capabilities is such a reasonable classification.

JUDGMENT.

1. The injunction prayed for by the plaintiffs in this case is denied and the complaint is dismissed.

2. No costs are awarded to any party as against the other.

3. In dismissing the complaint, the Court leaves open to any of the parties or their privies the right to reopen for a further order at the foot hereof upon a showing that defendants fail to accord to either white or negro children, as the case may be, the same degree of specialized instructional consideration as is given to the other.

4. Moreover, since this decision depends in large part on the substantial accuracy of the group differences reported by the University of Georgia on the basis of the annual testing of pupils in the Savannah-Chatham County schools, leave is granted to any party to apply to the Court for an order requiring that any such future test shall be taken or processed under any specific conditions reasonably adapted to insure that the results will be impartially conducted and reported.

5. Orders heretofore entered under mandate from the Court of Appeals with respect to a preliminary injunction remain of force and effect pending a prompt appeal from this decision on the merits.

/s/ Frank M. Scarlett,
Judge, U. S. District Court,
Southern District of Georgia.

Dated, June 28, 1963.

DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS.

In the
United States Court of Appeals for the Fifth Circuit

No. 20557.

Ralph Stell, et al.,
Appellants,
versus
Savannah-Chatham County Board of Education, et al., and Lawrence Roberts, et al.,
Appellees.

Appeal from the United States District Court for the Southern District of Georgia.
(33 Fed. 2nd 55; 1964.)

No. 2081.

Caroyln Eleanor Harris, et al.,
Appellants,
versus
Linda Sue Gibson, et al.,
Appellees.

Glynn County Board of Education, et al.,
Appellants,
versus
Linda Sue Gibson, et al.,
Appellees.

Appeals from the United States District Court for the Southern District of Georgia.

(June 18, 1964.)

Before Maris,* Gewin and Bell, Circuit Judges.

Bell, Circuit Judge: These appeals present issues arising out of a suit to desegregate the public school system of Savannah and Chatham County, Georgia (No. 20,557); and a suit to prevent the desegregation of the school system of Glynn County (Brunswick), Georgia (No. 20,871). The issues which are common to both cases will be considered together, while others, peculiar to the particular case, will be the subject of separate discussion.

The facts may be briefly stated. The appeal in the **Savannah** case is from an order of the District Court denying a preliminary injunction against the continued operation of a compulsory biracial school system. The denial was based on the affirmative defense, asserted by white intervenors, that disparate scores as between white and Negro pupils made on educational achievement and psychometric intelligence tests given in the Savannah schools warranted the classification of the schools for rational educational purposes on a basis which resulted only incidentally in a system separate for white and Negro children. We granted temporary relief pending the determination of the appeal. **Stell v. Savannah-Chatham County Board of Education**, 5 Cir., 1963, 318 F. 2d 425. The District Court then entered the injunctive order directed by this court.[1]

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* Of the Third Circuit, sitting by designation.

[1] The school board, the individual members thereof, and the superintendent of schools were:

". . . restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory bases with all deliberate speed, as required by the Supreme Court in Brown v. Board of Education of Topeka, 349 U. S. 294.

"It is further Ordered, Adjudged and Decreed that said persons be and they are hereby required to submit to this Court not later than July 1, 1963, a plan under which the

The school board then put a plan into effect desegregating the twelfth grade with the beginning of school in September, 1963. All students in that grade were given an opportunity to apply for transfer to any senior high school in the system, and the applications were to be granted or denied with reference to numerous assignment criteria. The plan adopted was based on the original Atlanta plan. See **Calhoun v. Latimer**, 5 Cir., 1963, 321 F. 2d 302. Appellants objected to the plan *in toto* but the District Court was of the view that it was without jurisdiction to accept or reject the plan. Twenty-four Negro students applied for transfer. Twenty-one were approved. Nineteen were transferred to two formerly all white nigh schools under the plan, the other two having declined to transfer. The other three transfers were denied for scholastic reasons.

The posture of the case on submission of the plan was that the District Court had dismissed the complaint in the interim between our granting emergency relief and when the hearing on the plan was proposed. However, the prior order of the court requiring the submission of a plan by the school board was preserved in the order of dismissal pending an appeal of the order of dismissal. Notice of appeal from the refusal of the court to approve or disapprove the plan was filed. Notice of appeal had previously been filed from the order denying the preliminary injunction. No appeal was taken from the order thereafter dismissing the complaint.

Appellants contend that they were entitled to the preliminary injunction sought in the first instance, and that

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said defendants propose to make an immediate start in the desegregation of the schools of Savannah-Chatham County, which plan shall include a statement that the maintenance of separate schools for the Negro and White children of Savannah shall be completely ended with respect to at least one grade during the school year commencing September, 1963, and with respect to at least one additional grade each school year thereafter."

the board should have been required to submit a plan of desegregation encompassing transfers in all grades on some reasonable non-racial basis; with students entering the system for the first time to be assigned without regard to race; and with school zone lines being drawn on a non-racial basis as to the first four grades in September, 1964, and as to at least two grades per year thereafter.

The school board takes the position that the case is moot because no appeal was taken from the order dismissing the complaint; and asserts that there was no error in denying the injunction sought because the school board had made a good faith start toward desegregation. It is also urged that the sufficiency of the plan as submitted to the District Court is not now before this court for consideration.

The intervenors seek to support the findings and conclusion of the District Court that the evidence warranted the prior classification of the schools which only incidentally had been on the basis of race.

In the **Glynn County** case we have the situation of the District Court having enjoined the school board from effecting a voluntary plan of desegregation relative to the eleventh and twelfth grades to begin in September, 1963, in the only white high school. This suit was commenced by white parents individually and on behalf of their minor children after the school board had announced that the transfer applications of the six minor Negro intervenors would be granted. It was alleged that desegregation of the school would be detrimental to both races, and the prayer, as was that of the intervenors in the **Savannah** case, was for an injunction against the operation of a "compulsory racially integrated school system",[2] or in

[2] No court has required a "compulsory racially integrated school system" to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools. See *Evers v. Jackson Municipal Separate School District*, 5 Cir.,

the alternative, that the school system be reorganized into a tertiary system, i. e., some schools for white, others for Negroes, and others for whites and Negroes with attendance being based on choice.

The Negro students who had been accepted for transfer were permitted to intervene. They sought the dissolution of the temporary restraining order against desegregation, and the entry of one on their behalf to the end that the school board be required to submit a plan for the reorganization of the entire school system on a non-racial basis. Their motion for preliminary injunction is still pending.

The District Court entered an order requiring the school board to prepare and submit a plan for the reorganization of the school system along non-racial lines with no applicant for transfer to be excluded solely on the grounds of color or other criteria unrelated to education. The plan was to be prepared only after hearings by the school board sitting as a school court pursuant to Georgia Code, § 32-910.[3] The intervenors considered this to be inade-

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1964, 328 F. 2d 408, and cases there cited. The interdiction is against enforced racial segregation. Incidental integration, of course, occurs through the process of desegregation. *Cf. Stone v. Board of Education of Atlanta*, 5 Cir., 1962, 309 F. 2d 638.

[3] "The county, city or other independent board of education shall constitute a tribunal for hearing and determining any matter of local controversy in reference to the construction or administration of the school law, with power to summon witnesses and take testimony if necessary, and when such board has made a decision, it shall be binding on the parties: Provided however, either party shall have the right to appeal to the State Board of Education, which appeal shall be made through the local superintendent of schools in writing and shall distinctly set forth the question in dispute the decision of the local board, a transcript of the testimony and other evidence adduced before the board certified as true and correct by the local superintendent, and a concise statement of the reasons why the decision below is complained of. This section shall apply to all county, city, or independent school systems in this State, regardless of when created. The State Board shall provide by regulation for notice to the parties and hearing on the appeal."

quate, and after the filing of notice of appeal we granted temporary relief pending determination of the appeal. The order enjoining the proposed desegregation was vacated with direction to the District Court that the school board be restrained from refusing to admit the six Negro students in September, 1963. **Harris v. Gibson**, 5 Cir., 1963, 322 F. 2d 780.

These intervenors now contend that the District Court erred in originally enjoining their school transfers, and in referring the matter of school desegregation back to the school board under the school administrative procedure statute. Ga. Code, § 32-910, *supra*. They complain of the failure of the school board to bring in a plan of desegregation for the entire school system, and, of course, are opposed to the position taken by the plaintiffs in their suit, which is the same as that of the intervenors in the **Savannah** case that classification on the basis of race is lawful where the education aptitudes warrant the classification. The school board takes the position that the order of the District Court is erroneous and impermissible, that it was error to permit the intervention, and that the mandated order of injunction against the school board should be dissolved, and the school board allowed to go forward with the voluntary plan of desegregation free of the instant litigation.

I.

Issues Separate to the Respective Cases.

The position of the Savannah board that its preliminary planning amounted to a good faith start toward desegregation is insufficient as an alternative reason for the denial of the temporary injunction. The short reply to the argument that the delay in desegregation was caused by the laws of Georgia to the contrary is that they have not served to impede desegregation since 1961. Both the University of Georgia and the Atlanta school system were

desegregated in 1961. **Holmes v. Danner**, M. D. Ga., 1961, 191 F. Supp. 394; **Calhoun v. Latimer**, *supra*.

Neither is there merit in the position that the case is moot because no appeal was taken from the order of dismissal entered after the appeal to this court, and after entry of an injunction by the District Court at the direction of this court by way of interim relief. The order of dismissal expressly preserved that injunctive order which necessarily required the existence of a complaint for its support. Moreover, another notice of appeal was thereafter filed when the District Court refused to consider the merits of the plan submitted by the school board. We have then the following sequence of events: an appeal pending in this court, a dismissal of the complaint by the District Court, and an additional appeal growing out of action in the District Court with respect to the appeal pending. We hold that the pendency of the appeal in this court which involved the same question as the dismissal order was adequate to preserve the appeal, and that our holding here will render the order of dismissal moot.[4] The case of **Dempsey v. Guaranty Trust Company**, 2 Cir., 1942, 131 F. 2d 103, is not to the contrary as it turned on the fact of a question arising in the District Court under an amended complaint filed after the appeal.

With respect to **Glynn County**, it is now settled that attendance by Negro students at schools free of discrimination based solely on race is a federal right, and claims of denial of that right may be adjudicated in the federal courts without first exhausting state administrative remedies. **McNeese v. Board of Education**, 1963, 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622; **Armstrong v. Board of Education of the City of Birmingham**, 5 Cir., 1963, 323

[4] This is not to say that a District Court should not go forward with a case while some part of it is on appeal. *Cf. United States v. Lynd*, 5 Cir., 1963, 321 F. 2d 26. The fact here is that the dismissal goes to the same question that was and is on appeal.

F. 2d 333, 336; and **Evers v. Jackson Municipal Separate School District**, 5 Cir., 1964, 328 F. 2d 408. It was thus error to relegate the board to the school administrative procedure statute.

It is also urged that the intervention should not have been allowed. We have held that intervention in school cases is not a matter of right but of discretion upon good cause being shown. **St. Helena Parish School Board v. Hall**, 5 Cir., 1961, 287 F. 2d 376, cert. den., 368 U. S. 830. The District Court here allowed the intervention and the question presented is whether the facts warrant a holding that there was error in so doing. We conclude that such is not the case.

II.

Common Issues Presented.

Left for consideration, and of dominant importance are two questions which are vital in both cases. The first is the question presented by the pleadings of the intervenors in the **Savannah** case, the evidence adduced on the hearing therein, and by the ruling of the court thereon. The same question is presented by the complaint in the **Glynn County** case. That question, as posed by the white intervenors and complainants is whether a state is forbidden by the equal protection clause of the Fourteenth Amendment from reasonably classifying its children in schools on the basis of their educational aptitudes because the difference in aptitude is also a racial characteristic. We must add for clarity: "with the result that the schools continue separate as to race."

The District Court answered this question in the negative, on the uncontested facts presented in support of the classification predicate. The conclusion reached was that a reasonable classification within the meaning of the equal

protection clause of the Fourteenth Amendment might be secured by division of the schools "on the basis of coherent groups having distinguishable educability capabilities. . ."

On the application to this court for interim relief in the **Savannah** case, **Stell v. Savannah-Chatham County Board of Education**, *supra*, we noted that the District Court permitted the intervention so that proof might be adduced as a factual basis for an effort to ask the Supreme Court to reverse its decision in **Brown v. Board of Education**, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. We also noted that the District Court was bound by the decision of the Supreme Court in **Brown**. We reiterate that no inferior federal court may refrain from acting as required by that decision even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law. We quoted from **Brown** as follows:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

We quoted from the decision of the Supreme Court in the second appearance of the **Brown** case, 1955, 349 U. S. 294, 75 S. C. T. 753, 99 L. Ed. 1083 where it was said:

> "The courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. **Once such a start has been made**, the courts may find that additional time is necessary to carry out the ruling in an effective manner" (Emphasis added).

Thus was the **Savannah** case ended then, and there it must end now. We do not read the major premise of the decision of the Supreme Court in the first **Brown** case as being limited to the facts of the cases there presented. We read it as proscribing segregation in the public education process on the stated ground that separate but equal schools for the races were inherently unequal. This being our interpretation of the teaching of that decision, it follows that it would be entirely inappropriate for it to be rejected or obviated by this court. See **Brown v. School District No. 20, Charleston,** E. D. S. C., 1964, 226 F. Supp. 819, affirmed, 4 Cir., 1964, 328 F. 2d 618; **Youngblood v. Board of Public Instruction of Bay County,** N. D. Fla., 1964, ... F. Supp. ..., dated May 28, 1964; and see also our opinion this date rendered in **Armstrong v. Board of Education of the City of Birmingham,** No. 20,595.

In this connection, it goes without saying that there is no constitutional prohibition against an assignment of individual students to particular schools on a basis of intelligence, achievement or other aptitudes upon a uniformly administered program but race must not be a factor in making the assignments. However, this is a question for educators and not courts.

The real fallacy, Constitution-wise, of the classification theory is that many of the Negro pupils overlap many of the white pupils in achievement and aptitude but are nevertheless to be segregated on the basis of race. They are to be separated, regardless of how great their ability as individuals, into schools with members of their own race because of the difference in test averages as between the races. Therein is the discrimination. The individual Negro student is not to be treated as an individual and allowed to proceed along with other individuals on the basis of ability alone without regard to race.

III.

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IV.

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The District Court is to retain jurisdiction of these cases during the period in which desegregation is to be accomplished.

As to **Savannah** (No. 20,557), the judgment is REVERSED and the case REMANDED for further proceedings not inconsistent herewith; as to **Glynn County** (No. 20,871) the judgment is AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, and REMANDED for further proceedings not inconsistent herewith.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1964.

No. 20,557.

(D. C. No. 1316—Civil Action.)

Ralph Stell et al.,
Appellants,

versus

Savannah-Chatham County Board of Education et al., and Lawrence Roberts et al.,
Appellees.

Appeal from the United States District Court for the Southern District of Georgia.

Before Maris,* Gewin and Bell, Circuit Judges.

ORDER AND JUDGMENT DATED JUNE 18, 1964.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby,

* Of the Third Circuit, sitting by designation.

reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Savannah-Chatham County Board of Education, and others, and Lawrence Roberts, and others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Issued as Mandate: Jun 18 1964.

Recoverable Costs:	
Docketing cause, etc.	$ 25.00
Costs of Printing Record	761.00
Costs of Printing Supplemental Record	281.25
Total	$1,067.25

In the United States Court of Appeals
For the Fifth Circuit.

No. 20,557.

Ralph Stell et al.,
Appellants,

v.

Savannah-Chatham County Board of Education et al., and
Lawrence Roberts et al.,
Appellees,

and

Lawrence Roberts and Daniel Roberts et al.,
Intervenors-Appellees.

Appeal from the United States District Court for the
Southern District of Georgia.

ORDER OVERRULING PETITION FOR REHEARING.

(July 23, 1964.)

Before Maris*, Gewin, and Bell, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing filed on behalf of Intervenors-Appellees in the above entitled and numbered cause be, and the same is hereby Denied.

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* Of the Third Circuit, sitting by designation.